

Constitutional Backdrops

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ABSTRACT

The Constitution is often said to leave important questions unanswered. These include, for example, the existence of a congressional contempt power or an executive removal power, the role of stare decisis, and the scope of state sovereign immunity. Bereft of clear text, many scholars have sought answers to such questions in Founding-era history. But why should the historical answers be valid today, if they were never codified in the Constitution's text?

This Article describes a category of legal rules that weren't adopted in the text, expressly or implicitly, but which nonetheless have continuing legal force under the written Constitution. These are constitutional "backdrops": rules of law that aren't derivable from the text, but are left unaltered by the text, and are in fact protected by the text from various kinds of legal change. These rules may have been incorporated by reference, they may have been insulated from change by the usual political actors, or they may have been preserved as "defeaters" for the Constitution's defeasible language. In each case, the text requires that the rules be given force, even though it doesn't supply their content.

Backdrops are not only a legitimate category of legal rules, but a surprisingly important part of our legal system. Moreover, recognizing backdrops as a category may help shed light on otherwise insoluble disputes.

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INTRODUCTION

Those who study the Constitution often worry about the relationship of text to history. When we use historical materials such as Farrand's *Records of the Federal Convention of 1787*,¹ should we use them merely as a dictionary of words and phrases, a guide to contemporary legal usage?² Or does history offer any rules or principles that aren't recorded in the text, but that nonetheless have continuing legal effect?

Modern constitutional theory has come a long way in insisting that the meaning of the ratified text, not the "unenacted hopes and dreams"³ of its authors, carries legal force. In the most prominent versions of originalism, for example, constitutional law is entirely determined by constitutional text: "[E]verything depends on what the particular textual term at issue generally would have been understood to mean at the time it became part of the Constitution."⁴

At the same time, the "sheer text does not address many situations which the constitutional sense of judges tells them must be addressed."⁵ The focus on text makes it harder to explain certain aspects of legal practice with an unquestioned historical pedigree—some of which are as old as the Founding. Consider the following questions:

- Can the Houses of Congress punish private citizens for contempt?
- Can Congress restrict the President's removal of executive officers?
- Are federal courts required, or even allowed, to apply stare decisis in constitutional cases?
- Do states have sovereign immunity from federal question suits?

These seem like constitutional questions, and courts have answered them as such—often relying on Founding-era history.⁶ But

¹ THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS].

² See, e.g., Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003) (investigating "the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted").

³ *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1143 (2011) (Thomas, J., concurring in the judgment) ("The Supremacy Clause commands that the '[l]aws of the United States,' not the unenacted hopes and dreams of the Department of Transportation, 'shall be the supreme Law of the Land.'" (quoting U.S. CONST. art. VI, cl. 2)).

⁴ Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1603 (2000).

⁵ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 76 (1982).

⁶ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138,

none of these issues is easily resolved by any specific provision of the Constitution's text.

Without presuming to answer these questions, this Article outlines an approach to answering them that follows from broadly held legal commitments. It identifies a set of cases in which we can look outside of the *text*, without looking outside of the *law*. These are constitutional "backdrops": rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change. These backdrops represent a surprisingly important category of legal rules, and recognizing them *as* a category may help shed light on some otherwise insoluble disputes.

Reading text in the light of history is hardly new. Ordinary interpretation includes looking to historical sources to explain whether, say, the phrase "ex post facto Law" in the Ex Post Facto Clauses⁷ referred only to criminal laws or to civil laws too.⁸ By contrast, backdrops become most relevant when interpretation is over, and when there's little dispute over what the text means—only what it requires of us.

When the text, properly interpreted, is silent on a given question, it hasn't automatically adopted the unspoken desires of the Founding generation. But neither has it delegated power to future political actors (such as judges) to fill the gaps. Rather, it has simply left well enough alone, keeping prior rules in place until they're properly changed. As Justice Breyer has put it, "[S]ilence is not ambiguity; silence means that ordinary background law applies."⁹ When something *else* in the text prevents us from changing the background law, that ordinary law becomes a constitutional backdrop.

A few examples can illustrate the concept. One type of backdrop is a rule incorporated in the Constitution by reference—explicitly identified in the text and preserved from future change. Suppose the

3151–52 (2010) (removal); *Alden v. Maine*, 527 U.S. 706, 715–24 (1999) (state sovereign immunity); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 232 (1821) (Houses' power to imprison); *Anastoff v. United States*, 223 F.3d 898, 900–03 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (*stare decisis*).

⁷ U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

⁸ See, e.g., *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (describing the phrase as "a term of art with an established meaning at the time of the framing" (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 396 (1798) (Paterson, J.))). See generally Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 578–84 (2003) (discussing Framing-era meanings of the phrase).

⁹ *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *accord id.* at 783 n.6 (majority opinion).

Ex Post Facto Clauses keep us from criminalizing acts that were legal when performed. To that extent, yesterday's criminal laws are forever part of our law, and can't be overridden completely without a constitutional amendment. But of course yesterday's criminal laws aren't part of *the Constitution*; they're just ordinary criminal laws. If we want to know whether Virginia permitted gambling in 1786, we won't find it in the ratified text. Here, we know what the constitutional text means; we simply need to look elsewhere to learn what rules of law are preserved from change. This is an easy case of a backdrop, almost trivial: the text tells us to look elsewhere for rules we have to apply.

Another type of backdrop, though, is never mentioned in the text. It's merely left in place, while the usual actors are disabled from changing it. Consider the law governing state borders. The Supreme Court, in deciding border disputes,¹⁰ applies a variety of rules relating to avulsion or accretion of shorelines.¹¹ Many of these rules have been consistently applied (and recognized as law) since the Founding.¹² But they have no textual source in the Constitution. In fact, the text explicitly says *nothing* about them; nothing in the Constitution may "be so construed as to Prejudice any Claims of the United States, or of any particular State."¹³ The text simply leaves these rules alone.

Yet the text does restrict how these rules can be changed. Because "Parts of States" can't be reassigned to other states without consent, neither Congress nor any state can redraw the borders without agreement all round.¹⁴ Until then, the existing, uncodified rules for sovereign borders continue in force. That's not because those rules are encoded in the Constitution, or are somehow part of the meaning of the text. It's because they were left alone, and because there's no way—short of an interstate compact or constitutional amendment—to get rid of them.

A third type of backdrop, perhaps a special case of the previous one, is left in place and protected from change even though a straightforward reading of the text might displace it. Consider the rule against legislative entrenchment, which prevents Congress from pro-

¹⁰ See U.S. CONST. art. III, § 2, cl. 1 (extending the judicial power "to Controversies between two or more States"); *id.* cl. 2 (conferring original jurisdiction on the Supreme Court in "all Cases . . . in which a State shall be Party").

¹¹ See, e.g., *New Jersey*, 523 U.S. at 784.

¹² See *id.* (citing authorities from Blackstone on).

¹³ U.S. CONST. art. IV, § 3, cl. 2.

¹⁴ See *id.* cl. 1; see also *id.* art. I, § 10, cl. 3 (requiring congressional consent to interstate compacts).

protecting its enactments against future repeal.¹⁵ That rule is found nowhere in the Constitution's text, and one might even think the text contradicts it: Article I grants Congress broad powers without any limitation concerning the possibility of repeal.¹⁶ (If Congress can say that "foreign commerce shall be regulated thus-and-so," why can't it say that "foreign commerce shall be regulated thus-and-so, *forever*"?)

What bars entrenchments isn't the text of Article I, but a separate, independent, and long-standing rule that legislatures lack power to bind their successors. The analogy might be to a broadly worded criminal statute punishing "all" violators, which no one reads to trump a separate common law defense of duress or of diplomatic immunity. The common law rule simply continues in effect, notwithstanding the general words of the text. But a duress defense, if unwise, can be abrogated by statute; even if we disliked the antientrenchment rule, it's not clear what anyone could do about it. Though absent from the text, the rule limits Congress's power in a way that would take a constitutional amendment to change.

This Article defends the existence, utility, and legitimacy of constitutional backdrops. First, it explains how backdrops are *possible*—how atextual rules can enjoy continuing legal force under a written Constitution. One of the assumptions of our legal system is that valid law remains valid until it's been validly changed. Because our Constitution was enacted as part of a common law legal system, rather than as a comprehensive code, it left most existing law in place. Some of that law was given continuing effect by the Constitution's text, whether through incorporation by reference (as in case of the Ex Post Facto Clauses) or through prohibitions on other governmental actors changing the rules (as in the case of state borders). And because our laws are written in a form that logicians call "defeasible,"¹⁷ constitutional provisions can occasionally be defeated, or trumped, by external legal rules not expressed in the text. The result is a constitutional text with different legal consequences than the ordinary interpretation of its terms might imply.

¹⁵ See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion). Compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *YALE L.J.* 1665 (2002) (criticizing the rule), with John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 *VA. L. REV.* 385 (2003) (defending it).

¹⁶ See Posner & Vermeule, *supra* note 15, at 1674–80.

¹⁷ See generally Carlos Iván Chesñevar et al., *Logical Models of Argument*, 32 *ACM COMPUTING SURVEYS* 337 (2000).

Second, this Article explains how backdrops are *useful*, and which areas of law they might illuminate. It presents four potential examples of backdrops, one for each component of our government: the power of Congress to punish non-Members for contempt; the power of the President to remove executive officers; the power of the judiciary to adhere to *stare decisis*; and the power of the states to assert immunity from suit. It also offers a few speculative thoughts on backdrops in other areas of law, such as interstate relations, individual rights, and judicial review. Of course, this Article can't provide a fully developed theory of any of these topics, let alone all of them. But it does argue that backdrops offer a more complete, as well as more theoretically consistent, way to think about a wide variety of legal topics not clearly addressed in the Constitution's text.

Third, this Article explains how backdrops are *defensible* against a variety of objections. These include the claims that backdrops merely replicate existing interpretive methods; that they have no binding legal force; that they entrench the dead hand of the past; that they're too changeable; that they're inconsistent with modern views of the common law; and that they extend open-ended invitations to claims of unenumerated powers or unenumerated rights. None of these objections holds water. Nor should they dissuade us from recognizing backdrops where text and history require them.

I. HOW ARE BACKDROPS POSSIBLE?

Our legal system recognizes many sources of law: constitutions, statutes, common law, and so on. These sources are not created equal. Constitutional rules trump statutory ones, just as statutory rules trump those of common law.¹⁸ Given this hierarchy, we say that constitutional rules are formally entrenched against ordinary means of legal change.¹⁹

This Article assumes that "America's Constitution is a written constitution, not an unwritten one."²⁰ That is, the only federal "consti-

¹⁸ "Rule" is used here in its broadest sense, as any instruction that might "screen[] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988). That includes precise rules, flexible standards, value-based principles, forgiving guidelines, and any other kind of instruction the law might convey.

¹⁹ See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 412 (2007). "Formal" distinguishes this kind of entrenchment from that enjoyed by, say, the Social Security Act—which is repealable, but protected by broad political support. See *id.* at 426–28.

²⁰ Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2049 (2006).

tutional” rules—the only ones that are formally entrenched—are those expressed (explicitly or implicitly) in the Constitution’s text. This is a limiting assumption, designed to make the argument below more difficult. The question this Article poses is whether, *even if* the text is the exclusive source of constitutional law, some legal rules external to the Constitution—including some that predated the Constitution—are nonetheless protected from repeal.²¹

This Part argues that the answer is yes. When the Constitution was adopted, it left the vast majority of existing legal rules in place. Some of these rules were included in the text itself—for example, in contemporary terms of art, which ordinary interpretation should reveal. But other rules not included in the text can still be preserved from change.

First, the Constitution incorporates certain rules by reference, giving them constitutional protection without including them in the text (or even specifying their content). Discovering the content of these incorporated rules isn’t an interpretive activity, but requires reference to history or to external sources of law.

Second, the Constitution implicitly insulates some rules from change by placing them beyond the reach of ordinary legislation. If the Constitution doesn’t alter or abrogate an external rule, the rule remains in effect, with no greater legal status than it would have otherwise. But if the Constitution separately prevents the usual legal actors from altering that rule, then the rule functions *like* a constitutional rule, and it may require a constitutional amendment to change. In this way, a rule can be effectively “constitutionalized” even though it’s nowhere to be found in the Constitution.

Third, the Constitution’s text can sometimes be limited by external rules that aren’t expressed in the document. The Constitution is written in a legal language that is defeasible—containing broad statements subject to defeat by specific types of rejoinders.²² Defeasibility is an underappreciated but fundamental feature of our law, and it applies equally to the Constitution. And when an unwritten defeater is itself protected from change, it too becomes a constitutional backdrop.

²¹ Compare, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 588 (2001) (rejecting textual exclusivity), with Kesavan & Paulsen, *supra* note 2, at 1128–29 (supporting it). Note that if the text allows or even requires the use of backdrops, then those who already accept atextual entrenchments should be open to backdrops as well.

²² See generally Chesñevar, *supra* note 17 (describing defeasible logic).

It might seem surprising that the supreme law of the land could preserve, or even be trumped by, various kinds of nonsupreme law. But as this Part shows, that fact is perfectly conventional, and indeed necessary on any sensible interpretative approach.

A. *The Law the Constitution Left in Place*

The Constitution is not a comprehensive code. As legal revolutions go, its adoption was relatively minor: the Founders didn't declare a legal Year Zero, nor did they repeal and replace all prior law. Compare this to the work of the codifiers in post-Revolution France: the Code Napoleon effected a "general abrogation of ancient laws," in which any rules "remaining outside the Code would provide no basis for overturning a judgment."²³ An early French commentator could say, with only mild exaggeration, that "I know nothing of civil law; I only teach the *Code Napoléon*."²⁴

By contrast, it would be absurd for an American academic to say that "I know nothing of the common law or statutes; I only teach the Constitution." The Constitution is supreme, in the sense of trumping anything that gets in its way, but it has nothing to do with the vast majority of U.S. law. Nor is the Constitution the formal source of all our legal obligations. True, federal law derives its authority from the U.S. Constitution: a Fish and Wildlife Service permit to export endangered species is issued under regulations,²⁵ which were authorized by a statute,²⁶ which was passed under some enumerated power.²⁷ But much state law has an independent authority that can't "be *derived* from the federal Constitution" in this way—even if it has to be *consistent* with that Constitution to take effect.²⁸ The validity of New

²³ Mario Ascheri, *Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoléon*, 70 TUL. L. REV. 1041, 1047–48 (1996); accord Angelo Piero Sereni, *The Code and the Case Law*, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD 55, 57 (Bernard Schwartz ed., 1956).

²⁴ Maurice Amos, *The Code Napoléon and the Modern World*, 10 J. COMP. LEGIS. & INT'L L. (3d ser.) 222, 224 (1928) (quoting Bugnet).

²⁵ 50 C.F.R. §§ 17.21(b), 17.22 (2011).

²⁶ Endangered Species Act of 1973 § 10, 16 U.S.C. § 1539 (2006).

²⁷ E.g., U.S. CONST. art. I, § 8, cl. 3 (granting power "[t]o regulate Commerce with foreign Nations"). For a similar derivation, see Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 336–37 (2005).

²⁸ Kent Greenawalt, *The Rule of Recognition and the Constitution*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 1, 24 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

Hampshire's dog-license requirements can be traced back only to the New Hampshire Constitution,²⁹ not the federal one.³⁰

Our founding document is firmly rooted in the common law tradition, in which each new enactment is layered on top of an existing and enormously complex body of written and unwritten law.³¹ Not even the American Revolution severed our links to the legal past: the change in government wasn't thought to produce a wholesale change in law, especially private law. Chief Justice Marshall once noted that the common law of England had largely been readopted by Virginia's legislature, but "[h]ad it not been adopted, I should have thought it in force."³² As he explained,

When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connection with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority.³³

The Constitution was no exception to this tradition. When adopted, it coexisted with the law of the original thirteen states, and even with some elements of the Articles of Confederation.³⁴ John Jay kept his office as the Confederation's Secretary of Foreign Affairs as late as March 1790, and even corresponded in that capacity with (the Constitution's) President George Washington.³⁵

Because the Constitution wasn't written on a blank slate, it's natural that some content from these preexisting rules found its way into the text. Many famous constitutional terms and concepts—"Bill of Attainder or ex post facto Law"; "Cases of admiralty and maritime

²⁹ See N.H. CONST. pt. II, art. 5; N.H. REV. STAT. ANN. § 466:1 (2011).

³⁰ This is strictly true only for the original thirteen states; Congress admitted the other thirty-seven under Article IV, and in that sense their law depends on the Constitution's validity. See Greenawalt, *supra* note 28, at 24.

³¹ See Sereni, *supra* note 23, at 58–59.

³² *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8411).

³³ *Id.*

³⁴ For discussions of the transition period, see generally Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 NOTRE DAME L. REV. 35 (2002); Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001).

³⁵ See Letter from George Washington to John Jay (June 8, 1789), in 10 THE WRITINGS OF GEORGE WASHINGTON 11 & n.† (Jared Sparks ed., Boston, Russell, Shattuck & Williams 1836).

Jurisdiction”; “Attainder[s] of Treason” that “work Corruption of Blood”³⁶—are incomprehensible without reference to America’s common law tradition.³⁷ All else being equal, we read these terms as retaining their prior meanings, with all the exceptions and qualifications carried over from prior law.³⁸ Important as they are, these terms of art are not backdrops: the preexisting rules they implement derive validity today from inclusion in the Constitution’s text, not any prior legal status.

By and large, though, the Constitution left most preexisting law alone. Any legal rule that wasn’t abrogated by the Constitution’s enactment simply kept on trucking after 1788. Such law remained in force subject to the Constitution’s requirements, to the privileged status of federal law under the Supremacy Clause, and to the ordinary processes of abrogation, amendment, and repeal. This subconstitutional law has no special, formal status in our legal system, even if it sometimes serves very important functions.³⁹ The question this Article poses is whether any of that law, though it wasn’t included in the Constitution, is nonetheless preserved from change.

B. *Incorporation by Reference*

1. *The Adoption of Preexisting Law*

The easiest way for the Constitution to shield other law from change is to say so. Consider the Ex Post Facto Clauses. As described above, whether those Clauses refer only to criminal laws or to civil laws also is an interpretive question about the text. Either way, though, the Clauses mean that there are some legal rules, protected from change by the Constitution, that *can’t* be discerned by interpreting the text. If Virginia allowed gambling in 1786—or just three days ago—those acts of gambling can’t be punished in the future. But you’d search the text in vain for references, even indirect ones, to gambling in Virginia. The incorporated rule might be constitutionally sacrosanct, but it stands on its own foundations, and is in no way derived from the Constitution.

³⁶ U.S. CONST. art. I, § 9, cl. 3; *id.* art. III, § 2, cl. 1; *id.* § 3, cl. 2.

³⁷ See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 58–59 (2009) (discussing constitutional terms drawn from the common law).

³⁸ See *Morissette v. United States*, 342 U.S. 246, 263 (1952).

³⁹ Cf. Young, *supra* note 19, at 415–16 (noting that “extracanonical” law often performs such “constitutional functions” as “creating governmental institutions, prescribing procedures by which those institutions operate,” and “confer[ring] certain rights on individuals”).

Other incorporations by reference were more explicit. Article VI guaranteed the Confederation government's obligations, stating that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution," would be "as valid against the United States under this Constitution, as under the Confederation."⁴⁰ What made a given "Debt" or "Engagement" valid in the first place? That went unspecified, and would necessarily depend on the law that existed "before the Adoption of this Constitution."⁴¹ Likewise, Article IV conferred on the new government all preexisting claims to "Territory or other Property belonging to the United States," without stating what these claims were or how their strength should be judged.⁴² Some preexisting law even became the "supreme Law of the Land": the Supremacy Clause included past treaties as well as future ones, referring to "all Treaties *made*, or which *shall be made*, under the Authority of the United States."⁴³ And the ratification of the Seventh Amendment in 1791 required "the right of trial by jury" to be "preserved," and banned reexamination of jury-found facts except "according to the rules of the common law"—which has been read to mean the practices then obtaining at Westminster.⁴⁴

In each case, the authority of the rule of law at issue can't be derived wholly from the Constitution's text. If you want a full explanation of why Article I of the 1783 Treaty of Paris is currently law in the United States,⁴⁵ part of the answer has to include preconstitutional rules about treaty formation. But because the Constitution's text

⁴⁰ U.S. CONST. art. VI, cl. 1. The Fourteenth Amendment did something similar with respect to Civil War debt. *See id.* amend. XIV, § 4 ("The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.").

⁴¹ *Id.* art. VI, cl. 1. Some critics of the Constitution saw the Debts and Engagements Clause as ignoring "debts due *to* the United States," and thus as robbing the public fisc. *See* THE FEDERALIST NO. 84, at 583 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In response, Hamilton cited authorities on natural law and the law of nations, arguing that "it is a plain dictate of common sense," as well as "an established doctrine of political law, that States neither lose any of their rights, nor are discharged from any of their obligations by a change in the form of their civil government." *Id.* (emphasis omitted) (internal quotation marks omitted).

⁴² U.S. CONST. art. IV, § 3, cl. 2.

⁴³ *Id.* art. VI, cl. 2 (emphasis added).

⁴⁴ *See* *Curtis v. Loether*, 415 U.S. 189, 192–93 (1974); *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935); *see also* *Tull v. United States*, 481 U.S. 412, 417–18 (1987) (invoking English practice). *But see* AKHIL REED AMAR, THE BILL OF RIGHTS 89–93 (1998) (arguing that the Amendment "preserve[s]" rights in forum-state law at the time of trial).

⁴⁵ *See* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2011, at 295 (2011).

openly acknowledges the authority of these rules (at least in limited cases), the rules continue to have some legal force today.

2. *Incorporation and Interpretation*

Using common law terms of art and incorporating prior law by reference might seem very similar. Both require us to learn lots of old law. We could say that, under the Seventh Amendment, judges can't reject certain jury findings; or we could say that judges can't violate certain common law rules (which in turn stop them from rejecting those jury findings). The latter is more complicated, but does it make a difference? Why not treat them as the same?

The temptation to conflate these two examples rests on a confusion about the word "means." As Christopher Green has explained, there's a fundamental difference between the sense, or linguistic meaning, of a term and the objects in the world to which the term refers.⁴⁶ For example, "the most populous state" could refer to different states at different times or in different possible worlds; the sense of the phrase is the semantic content that helps us pick out the right one in each. "'The most populous state' means California" is a statement about reference; "'the most populous state' means 'the state with the most people who live there'" is a statement about sense.

A term's sense is usually preserved when it's replaced by a synonym. If the Constitution used the word "bachelor," and we replaced it with "unmarried man," very little ought to change.⁴⁷ Most debates about "what the text means" involve figuring out the right synonyms—like whether "ex post facto Law" could be replaced by "law imposing retrospective criminal liability." To answer that question, we have to use ordinary interpretation—taking historical, legal, and linguistic contexts into account.⁴⁸

By contrast, when a textual provision incorporates a preexisting rule by reference, there's often little doubt about its sense or linguistic

⁴⁶ See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 560 (2006). On the distinction generally, see GOTTLÖB FREGE, *On Sinn and Bedeutung*, in THE FREGE READER 151 (Michael Beaney ed., 1997) (1892). For this Article's purposes, one needn't adopt all of Frege's views on language, or even use "sense" or "reference" with full Fregean rigor—a rough distinction is enough for now.

⁴⁷ With appropriate exceptions for references to the word itself; e.g., "If the President ever says 'bachelor,' then . . ."

⁴⁸ A phrase that looks like a term of art might also have its meaning shaded by language elsewhere in the document, and might take on new content in new surroundings. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). Getting the sense right thus depends on a variety of considerations, not just whether the term had a particular meaning at common law.

meaning. The real action centers on the reference. We may feel relatively confident that we know which terms were *synonymous* with “Debts and Engagements” in Article VI, but we still want to know what the mentioned debts and engagements actually *were*.

This conceptual difference has profound practical consequences for interpretation. The sense of a provision may depend on our interpretive theory—whether, say, we borrow linguistic conventions from the Framers, the ratifiers, a hypothetical reasonable reader, subsequent judges, the general public today, etc. (This Article tries to be agnostic on the question.) But an incorporation by reference—once we’re satisfied, after applying our interpretive theory, that it *is* an incorporation by reference—isn’t subject to these disputes. So long as the external rule being incorporated isn’t contradicted by something else in the text,⁴⁹ it comes in pure.

Consider the Seventh Amendment. The Framers’ understanding of English jury-review practices *might* be evidence of whether they tried to protect them—that is, whether or not “the rules of the common law” really meant “the practices now current at Westminster.” That’s an interpretive question, and a difficult one. But once we answer that question affirmatively, the Framers’ opinions about those practices—their unenacted hopes and dreams—become irrelevant. By assumption, the Amendment incorporated the practices as they actually were, not as anyone might have imagined them to be.

This distinction is an important one. If the Framers wanted to shield English jury-review practices, one might say, why *wouldn’t* we care about which practices they knew of, and which ones they had in mind to preserve? But that argument ignores the Seventh Amendment’s sense in favor of its expected applications; it replaces what the Framers said, and intended to say, with what they intended to achieve by doing so. On most modern interpretive approaches, only the former matters. Article I apportions representatives among states “according to their respective Numbers”;⁵⁰ even if the Framers thought Maryland would turn out larger than North Carolina—as they in fact did—the actual census numbers still control.⁵¹ Or, to cite an example from Ronald Dworkin:

⁴⁹ Or, perhaps, what the Framers called “repugnant” to the text. See PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309–16 (2008); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 513–15 (2006).

⁵⁰ U.S. CONST. art. I, § 2, cl. 3.

⁵¹ See *id.* (temporarily giving Maryland one more seat than North Carolina); An Act for Apportioning Representatives Among the Several States, According to the First Enumeration,

Suppose a boss tells his manager (without winking) to hire the most qualified applicant for a new job. The boss might think it obvious that his own son, who is an applicant, is the most qualified; indeed he might not have given the instruction unless he was confident that the manager would think so too. Nevertheless, what the boss *said*, and *intended* to say, was that the most qualified applicant should be hired, and if the manager thought some other applicant better qualified, but hired the boss's son to save his own job, he would not be following the standard the boss had intended to lay down.⁵²

As Green puts it, "The choice of language is a choice about what sorts of changes should make a difference."⁵³

The point can be made more generally. Determining the sense of the text, its linguistic meaning, is an interpretive activity. But once "there is no question as to how a person is to be understood," then the activity of interpretation is at an end.⁵⁴ Many texts incorporate external standards, and confusion about how to apply such a standard is not confusion about the linguistic meaning of that text.

Otherwise one falls into the King Midas Fallacy, in which everything that law touches, turns to law.⁵⁵ Suppose the Sixth Amendment provided that "juries shall have six members, unless Fermat's Last Theorem is true, in which case twelve."⁵⁶ The difficulty in applying that rule wouldn't be ambiguity, vagueness, or any *legal* uncertainty, but just some really hard math. Not even the best theory of "constitutional interpretation" can help you there. Likewise, if you want to know whether the United States is bound to pay a particular Revolutionary War debt, you need to look through old contract instruments, not just stare harder at the Debts and Engagements Clause. And "[i]f, on the best interpretation, the law requires you to do what is reasona-

ch. 23, 1 Stat. 253 (1792) (allocating North Carolina two more seats than Maryland); *see also* Green, *supra* note 46, at 580 (describing a similar example).

⁵² Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 115, 116–17 (Amy Gutmann ed., 1997).

⁵³ Green, *supra* note 46, at 583.

⁵⁴ Timothy Endicott, *Legal Interpretation*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 109, 121 (Andrei Marmor ed., 2012).

⁵⁵ Cf. Leslie Green, *Legal Positivism*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Summer 2012), <http://plato.stanford.edu/archives/sum2012/entries/legal-positivism> (describing the "Midas Principle").

⁵⁶ The theorem—that there are no positive integers a , b , c , and n such that $a^n + b^n = c^n$ and $n > 2$ —wasn't proved until the mid-1990s. *See* Andrew Wiles, *Modular Elliptic Curves and Fermat's Last Theorem*, 141 *ANNALS MATHEMATICS* (2d ser.) 443 (1995).

ble, you will need a technique other than interpretation in order to identify the reasons at stake.”⁵⁷

The content of a backdrop rule lies outside the Constitution’s properly interpreted text. But that doesn’t mean the rule is indeterminate, or somehow up for grabs. When the text refers to an external standard, we apply the external standard; that it lies outside the text makes no difference. That is why a backdrop may be undetermined by *text*, without being undetermined by *law*.

C. *Insulation from Change*

As explained above, external rules are often incorporated through express provisions in the text. But other kinds of rules become constitutional backdrops without being mentioned in the text *at all*—because the text disables the usual legal actors from changing them.

1. *The Problem of Borders*

The best example of this category involves the location of interstate borders. As noted above, the Territorial Clause recognized that the United States and the several states had “Claims” to various portions of territory, which the Constitution could not be “so construed as to Prejudice.”⁵⁸ Those claims were necessarily founded on preexisting sources of law, which the Constitution didn’t disturb.

But the Constitution may limit the government’s ability to change those preexisting rules. Though federal courts can hear boundary cases—both “between two or more States” and between same-state citizens “claiming Lands under Grants of different States”⁵⁹—it’s doubtful that Congress can alter the rule of decision for existing disputes. According to Article IV, “[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned.”⁶⁰

A statute prescribing different rules to find the current borders—that is, one drawing the lines differently than under preexisting rules—would effectively reassign territory from one state to another, “form[ing]” a state “by the Junction of . . . Parts of States.” That re-

⁵⁷ Endicott, *supra* note 54, at 109.

⁵⁸ U.S. CONST. art. IV, § 3, cl. 2.

⁵⁹ *Id.* art. III, § 2, cl. 1.

⁶⁰ *Id.* art. IV, § 3, cl. 1.

quires state consent, even if the state thus “formed” isn’t “new.”⁶¹ So although Congress can approve an interstate compact adjusting borders for the future,⁶² it can’t change the rules by which present borders are determined.

No state can change the rules either. Before one state reassigns another’s territory, Article IV requires the other’s consent, as well as that of Congress. Even setting aside this requirement (as well as the obvious difficulty of a state acting as judge in its own cause),⁶³ annexing land that lies in another state would be a prohibited act of war—in which states usually may not “engage” without Congress’s consent.⁶⁴ As a result, the Supreme Court has refused to defer to state law on border questions, and has resolved interstate disputes “even if legislation of one or both of the States seems to stand in the way.”⁶⁵

2. *The Solution of Preexisting Law*

If the Constitution is silent, and Congress and the states can’t provide their own rules of decision, what’s a court to do? A century ago, the Supreme Court answered as follows: “[W]hen a dispute arises about boundaries,” a court of competent jurisdiction must “determine the line, and in doing so must be governed by rules explicitly or implicitly recognized,” which it “must follow and apply.”⁶⁶

In recent times, the Court has claimed its own power to author such rules—presumably delegated by the grant of judicial power in Article III.⁶⁷ Traditionally, though, “[i]nstead of fashioning a brand new code of interstate relations, the Court has relied heavily upon preexisting bodies of general law.”⁶⁸ For example, it has “long recog-

⁶¹ On whether the formation of a “new” state within another requires consent or is wholly forbidden, see Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291 (2002).

⁶² See U.S. CONST. art. I, § 10, cl. 3.

⁶³ Cf. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1325 (1996) (“[N]either party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other.”); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 508 (2006) (“[A state] cannot authoritatively resolve the dispute simply by passing a statute arrogating all of the disputed territory or water to itself.”).

⁶⁴ U.S. CONST. art. I, § 10, cl. 3.

⁶⁵ *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

⁶⁶ *Id.* at 519–20.

⁶⁷ See, e.g., *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977) (“[T]his Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.” (emphasis added)); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 672 (1979).

⁶⁸ Nelson, *supra* note 63, at 508.

nized that a sudden shoreline change known as avulsion (as distinct from accretion, or gradual change in configuration) has no effect on boundary.”⁶⁹ Likewise, the Court has applied “the rule of the thalweg,”⁷⁰ that “the river boundary between States lies along the main downstream navigational channel, or thalweg”—as well as an “island exception” to that rule, that “if there is a divided river flow around an island, a boundary once established on one side of the island remains there, even though the main downstream navigation channel shifts to the island’s other side.”⁷¹

These rules don’t come from the Constitution, which says nothing about thalwegs. They’re derived from the common law, and in particular from the international law of sovereign borders. As recently as 1998, the Court described these rules of accretion and avulsion as “the received rule of law of nations on this point, as laid down by all the writers of authority, including Sir William Blackstone.”⁷² Nor is this a recent view: in 1827, *Harcourt v. Gaillard* recognized that the private land dispute at issue—founded on competing claims by the United States, South Carolina, and Georgia—had to be decided “upon international principles.”⁷³

The Court expanded on this theme in 1838, after Rhode Island filed a bill in equity against Massachusetts to assert sovereignty and jurisdiction over disputed territory (but not actual ownership of the land, which was held by private parties).⁷⁴ Rather than claiming authority to make up rules for itself, the Court read Article III only to “give[] power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them.”⁷⁵ The equity side of the Court was the proper forum in which to seek such “an incorporeal right, as that of sovereignty and jurisdiction,”⁷⁶ and the Court therefore followed procedures consistent with “the principles and usages of a court of equity.”⁷⁷ Those principles required the Court to act no differently “in deciding on boundary between states,

⁶⁹ *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (internal quotation marks omitted).

⁷⁰ *Louisiana v. Mississippi*, 516 U.S. 22, 24 (1995).

⁷¹ *Id.* at 25.

⁷² *New Jersey*, 523 U.S. at 784 (citation omitted) (internal quotation marks omitted). On the thalweg, see *Louisiana v. Mississippi*, 202 U.S. 1, 50–51 (1906), and *Iowa v. Illinois*, 147 U.S. 1, 8–10 (1893).

⁷³ 25 U.S. (12 Wheat.) 523, 527 (1827).

⁷⁴ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 714–16 (1838).

⁷⁵ *Id.* at 737 (citation omitted).

⁷⁶ *Id.* at 744 (citing *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 413 (1799)).

⁷⁷ *Id.* at 732.

than on lines between separate tracts of land”⁷⁸; it would determine the merits “by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature . . . as it is bound to act by known and settled principles of national or municipal jurisprudence [that is, the law of nations or domestic law], as the case requires.”⁷⁹ The Court decided whether a particular agreement had settled the case “according to the law of equity”; it tested the validity of both parties’ Crown charters “according to the law of nations”; and it considered Massachusetts’s prescription claim under “the law of prescription . . . on the same principles which have been rules for the action of this Court” in prior cases involving sovereign grants.⁸⁰ In other words, having been granted jurisdiction without a prescribed rule of decision, the Court was bound to follow the applicable preexisting rules, whatever they might be.

3. *Why Choose Existing Law?*

The idea of a court applying law that wasn’t the product of a legislature or of its own authorship may seem odd in today’s world. But it’s worth remembering that this approach was commonplace for the first 150 years of the Constitution’s existence—that is, before *Erie Railroad Co. v. Tompkins*.⁸¹ Courts routinely investigated and applied “general” law that was shared among multiple sovereigns.⁸²

Leaving the existing law on sovereign borders intact would also have been an obvious way for the Framers to get past a complicated and contentious issue. The delegates at Philadelphia had enough on their plates already. They knew that border disputes existed, and they avoided them like the plague—doing nothing to resolve them in the Constitution, and adding the Territorial Clause proviso to make doubly sure. And it’s hardly surprising that they banned Congress from redrawing borders at will: if the states couldn’t agree on the right lines, the Framers didn’t want anyone else monkeying around with

⁷⁸ *Id.* at 734.

⁷⁹ *Id.* at 737. “National” jurisprudence in this context meant the law of nations, as compared to “municipal” jurisprudence or domestic law. See, e.g., DAVID HOFFMAN, A COURSE OF LEGAL STUDY 238 (Balt., Coale & Maxwell 1817) (stating that “the code of national jurisprudence is susceptible of four great divisions,” and describing four branches of the law of nations).

⁸⁰ *Rhode Island*, 37 U.S. at 749.

⁸¹ 304 U.S. 64 (1938).

⁸² See Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. (forthcoming 2012) (manuscript at 3–5), available at <http://ssrn.com/id=2021489>. On general law, see generally William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Nelson, *supra* note 63.

them either. Instead the Constitution, like the Articles of Confederation, created a neutral forum to hear such disputes without prescribing any particular rules for that forum to apply.⁸³

It was equally natural for those rules to be heavily influenced by the law of nations. Today the states typically aren't thought of as subjects of international law.⁸⁴ But at the Founding, they were often viewed as foreign to one another, except with respect to areas controlled by federal law.⁸⁵ That's why James Iredell, in a draft opinion, described the law of nations as "the Law respecting the situation of the American States to each other, in all those cases where the States have not surrendered their authority to the general government."⁸⁶

Upon declaring independence, the thirteen colonies became "Free and Independent States," with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."⁸⁷ At that time, as the Supreme Court has recognized, the states' borders with each other *were* international borders, and could only be governed by the law of nations: "When independence was achieved, the precepts to be obeyed . . . were those of international law."⁸⁸ The Articles of Confederation brought the states into a "firm league of friendship,"⁸⁹ but also preserved their "sovereignty, freedom and inde-

⁸³ See U.S. CONST. art. III, § 2, cl. 1; ARTICLES OF CONFEDERATION of 1781, art IX, para. 2.

⁸⁴ See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2801 n.13 (2011) (Ginsburg, J., dissenting) (collecting sources); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 reporters' note 5 (1986) ("A State of the United States is not a 'state' under international law, since . . . it does not have capacity to conduct foreign relations." (citation omitted)).

⁸⁵ See, e.g., *Warder v. Arell*, 2 Va. (2 Wash.) 282, 298 (1796) ("[T]hough they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal laws are to each other foreign."); see also *Rhode Island*, 37 U.S. at 720 (describing the states as "sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes"); *Buckner v. Finley*, 27 U.S. (2 Pet.) 586, 590 (1829) ("For all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of each other."); *James v. Bixby*, 11 Mass. (11 Tyng) 34, 40 n.a (1814) (collecting sources for the same proposition).

⁸⁶ James Iredell, *Observations on State Suability* (Feb. 11–14, 1792), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 76, 82 (Maeva Marcus ed., 1994) [hereinafter DHSC].

⁸⁷ THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

⁸⁸ *New Jersey v. Delaware*, 291 U.S. 361, 378 (1934).

⁸⁹ ARTICLES OF CONFEDERATION of 1781, art. III.

pendence,”⁹⁰ and provided an ad hoc court to hear border disputes without changing the rules by which those disputes were governed.⁹¹ The Constitution switched the forum to the Supreme Court,⁹² but otherwise left the borders where they were, absent any settlement through interstate compact.⁹³ Thus, even though international law might “have less importance for . . . states united under a general government than for states wholly independent,” the Supreme Court has still applied “the same test . . . in the absence of usage or convention pointing to another.”⁹⁴

4. *Insulation and Interpretation*

The Constitution may oblige courts, in some circumstances, to apply international law to find sovereign borders. But of course the Constitution doesn’t actually *say* that, and it doesn’t stage-whisper it either. No incorporation by reference was ever ratified in the text—which explicitly refused to “Prejudice any Claims” by saying anything about state borders.⁹⁵

Nor were the sovereign border rules somehow smuggled in through constitutional terms of art. Though territorial principles like the thalweg rule partly determine our territorial states,⁹⁶ it would be very odd to treat those rules as part of the linguistic meaning of the word “State.” Doing so would suggest that dictionary entries for “State” would have been inaccurate if they failed to mention thalwegs; that contemporary speakers might have refused to use “State” to describe polities whose borders failed to follow the rule;⁹⁷ that a hypothetical No-Thalweg Clause, providing that “borders between States shall not follow the thalweg rule,” would have been a contradiction in terms—like saying that “bachelors shall not be unmarried.” None of these inferences seems remotely likely, and neither does the supposi-

⁹⁰ *Id.* art. II.

⁹¹ *Id.* art IX, para. 2.

⁹² U.S. CONST. art. III, § 2, cl. 2.

⁹³ *Cf.* *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (stating that the “common-law rule speaks in the silence of the [States’] Compact”); *id.* at 783 n.6 (“[T]he silence of the Compact was on the subject of settled law governing avulsion, which the parties’ silence showed no intent to modify.”).

⁹⁴ *New Jersey v. Delaware*, 291 U.S. 361, 380 (1934).

⁹⁵ U.S. CONST. art. IV, § 3, cl. 2.

⁹⁶ *Cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 316–17 (1992) (portraying the states as fundamentally territorial in nature).

⁹⁷ *Cf.* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 522 (2000) (making a similar argument).

tion that the word “State,” on its own, carried with it all the intricate rules of sovereign borders as a matter of pure linguistic meaning.

As a result, it’s irrelevant whether any Framer or ratifier ever heard of the *thalweg* rule, much less the island exception. The only thing the Constitution did, and all they voted on, was to disable certain actors from altering sovereign borders, wherever they might be. Agreement on the document’s meaning doesn’t require agreement on every rule that it failed to displace.

This point is crucial, because the text doesn’t necessarily prevent Congress from adjusting *future* borders. The rules governing state borders aren’t themselves constitutional law. Rather, they’re a form of common law, protected from certain kinds of interference, and subject to override by any competent authority when that protection runs out. Maybe Congress can enact prospective rules on how today’s borders might change—such as by locking in today’s shorelines against future accretions—without thereby “form[ing]” a state from the junction of “Parts of States.”⁹⁸ Such a law would still have to be an exercise of some enumerated power. But nothing in the theory of backdrops can dismiss it out of hand.

The end result is as follows: If the Constitution doesn’t say anything about the accretion or avulsion of shorelines, that’s not a gap *we* have to fill as interpreters. It may be a gap that’s automatically filled by ordinarily applicable law, operating of its own force. And that ordinary law is subject to ordinary means of legal change—unless, of course, it receives protection from some *other* part of the text.

5. *The Implications for Federal Common Law*

This discussion of interstate borders could be generalized. Federal courts have applied unwritten doctrines in various special “enclaves” of law—such as “the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”⁹⁹ On such issues, Caleb Nelson writes, “[T]he structure of our federal system is thought to keep state law from applying of its own force, but the Constitution has not specified the substantive rules that apply instead.”¹⁰⁰ Sometimes courts claim the right to invent federal

⁹⁸ Cf. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2610–13 (2010) (considering whether an alleged deprivation of the right to future accretions constituted a taking of property).

⁹⁹ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted).

¹⁰⁰ Nelson, *supra* note 63, at 507.

common law in these areas,¹⁰¹ a practice that has given rise to charges of illegitimacy.¹⁰² But in practice, “the applicable rules of decision are typically grounded in some type of general law.”¹⁰³

Though this area is highly complex (and the following thoughts rather tentative), a backdrops approach might better explain and justify this practice. If a certain set of general common law or international law doctrines governed a particular field at the Founding, and if the states lack power to change them, then those doctrines continue to operate of their own force—until the political branches intervene, in the exercise of some enumerated power. The fact that, in the meantime, disputes may arise which a “court must decide does not mean, of course, that it takes the place of a legislature.”¹⁰⁴ Instead, the court simply applies the existing rules, reserving for the political branches the decision of whether to keep those rules in place or to alter them. And if no enumerated power is available, then the existing rules become a backdrop.

This approach is arguably more legitimate than the modern account of federal common law. For example, in *Kansas v. Colorado* (an interstate water rights dispute), the Supreme Court invoked international law as a source of authority, but it failed to identify any relevant international law principles to guide its decision.¹⁰⁵ Instead, it tried to act “upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.”¹⁰⁶ Maybe the relevant general rules imposed nothing but a reasonable-use requirement, or gave authority to the Court to decide *ex æquo et bono*.¹⁰⁷ But if not, the Court would find stronger legal support by relying on doctrines that have “prevailed from the time of the first settlements”

¹⁰¹ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (“In [the] absence of an applicable Act of Congress it is for the federal courts to *fashion* the governing rule of law according to their own standards.” (emphasis added)).

¹⁰² See Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 764 (1989) (“Short of a finding of constitutional invalidity, it is democratically illegitimate for an unrepresentative judiciary to overrule, circumvent, or ignore policy choices made by the majoritarian branches.”).

¹⁰³ Nelson, *supra* note 63, at 507.

¹⁰⁴ *Missouri v. Illinois*, 200 U.S. 496, 519–20 (1906).

¹⁰⁵ 206 U.S. 46, 97–100 (1907).

¹⁰⁶ *Id.* at 100.

¹⁰⁷ See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 738 (1838) (describing the role of “judicial equity, administered by a court of justice, decreeing the equum et bonum of the case”).

of the contesting states,¹⁰⁸ rather than assuming the role of Supreme Hydrologist to determine, “upon a consideration of . . . all other relevant facts, . . . what is an equitable apportionment of the use of such waters.”¹⁰⁹

The backdrops approach could also be compared with an account that treats federal common law as a product of constitutional structure. A.J. Bellia and Bradford Clark have argued that courts may apply traditional rules of the law of nations as a form of federal common law, if departing from those rules would usurp authority that the Constitution has allocated elsewhere.¹¹⁰ Clark, for example, suggests two criteria for federal common law rules: (1) that they govern transactions that “fall beyond the legislative competence of the states,” and (2) that they “operate to further some basic aspect of the constitutional scheme”—such as by preventing “interfer[ence] with matters that the Constitution assigns exclusively to the political branches,” or by “implementing the constitutional equality of states.”¹¹¹

In some ways, this account is very similar to a backdrops approach. Consider the rules of diplomatic immunity, a traditional subject of the law of nations. If, as Clark argues, “[t]he decision whether and how to depart from such law is ‘a question rather of policy than of law’ and thus is committed to the discretion of the political branches,” then courts must apply the traditional rules until they are instructed otherwise.¹¹² “Although the Constitution is not itself the *source* of the particular rules,” its allocation of power “arguably requires state and federal courts to *apply* such rules in the absence of positive federal law.”¹¹³ Courts don’t “create the governing rule of decision according to their own standards”; they ascertain it “by reference to a preexisting body of customary law,”¹¹⁴ and so can’t be accused of “unrestrained judicial lawmaking.”¹¹⁵ Congress and the President stay in the driver’s seat.

¹⁰⁸ *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922), *vacated by consent*, 353 U.S. 953 (1957).

¹⁰⁹ *Connecticut v. Massachusetts*, 282 U.S. 660, 670–71 (1931).

¹¹⁰ See Bellia & Clark, *supra* note 37, at 7–9; Anthony J. Bellia Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795, 1795–96 (2010) [hereinafter Bellia & Clark, *Political Branches*]; Clark, *supra* note 63, at 1251–52; see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012) (applying this framework to the branches’ enumerated powers).

¹¹¹ Clark, *supra* note 63, at 1251.

¹¹² *Id.* at 1319 (footnote omitted) (quoting *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814)); accord Bellia & Clark, *supra* note 37, at 85.

¹¹³ Clark, *supra* note 63, at 1320 n.349.

¹¹⁴ *Id.* at 1301.

¹¹⁵ *Id.* at 1287.

Where this account differs from the backdrops approach is in its premise that the traditional, unabrogated rules “do not apply . . . of their own force.”¹¹⁶ Clark portrays the thalweg rule, for example, as an attempt to “preserve and implement the constitutional equality of the states,” because it maintains each state’s access to channels of navigation.¹¹⁷ But is the rule more equal with or without its island exception? If accretion moves the river’s course, would the states prefer to keep their islands or their navigation channels? Either answer could promote constitutional equality—and so could a variety of others. If there’s nothing special about the historical rule in particular, then there’s little reason why courts shouldn’t try to improve on it, to better serve their various constitutional goals. And if the rule, at the Founding, had no legal force of its own, then retaining it today doesn’t preserve an allocation of anything: any default will do.

The best justification for retaining the thalweg rule as it stood—warts and all—may be that it *was* law at the Founding, and that it has never since been changed. Without that assumption, Clark’s two criteria are insufficient to explain why the rule deserves continuing respect. And with that assumption, the two criteria are unnecessary. Why is it important that a common law rule be “necessary to implement some feature of the constitutional structure”¹¹⁸—or that an international law rule be among the “perfect rights of nations” necessary to “avoiding war and preserving the constitutional prerogatives of the political branches”?¹¹⁹ Judicial lawmaking arouses our suspicions precisely because the decision of whether and how to depart from existing law is *usually* “committed to the discretion of the political branches,” not just in particularly important cases. The ordinary powers of regulating commerce or establishing post offices were vested in the political branches no less exclusively than the powers “to conduct foreign relations and to decide questions of war and peace.”¹²⁰

The role of the common law in the federal system is a deep and fundamental question, and one well beyond the scope of this Article. But even as to ordinary subjects, federal courts may well have only a limited ability to disregard traditional rules and to impose their own preferred outcomes. When those rules lie outside the states’ legisla-

¹¹⁶ *Id.* at 1329.

¹¹⁷ *Id.* at 1330.

¹¹⁸ *Id.* at 1365.

¹¹⁹ Bellia & Clark, *Political Branches*, *supra* note 110, at 1799.

¹²⁰ *Id.*

tive competence, and when the political branches either cannot or have chosen not to change them, there is a strong case for their remaining law today.

D. *Defeasible Language and Defeaters*

The previous Sections described two categories of backdrops—incorporations by reference and rules insulated from abrogation—that are given some explicit protection in the constitutional text. A third type of backdrop, however, involves rules that carry legal force even though they are ostensibly contrary to, or at least in tension with, the usual meaning of the text. These backdrops result from the fact that legal language is defeasible: the literal meaning of a provision can be defeated by rules found elsewhere in the law. In many cases, moreover, the same reasons why these rules persist in force despite the text also explain why the usual actors lack power to amend them. Though this type of backdrop may seem counterintuitive (if not bizarre), it is in fact a commonplace, and perhaps inescapable, feature of our law.

1. *Defeasibility and the Law*

Our ordinary language is full of defeasible statements. A sentence like “birds fly” isn’t universally true; a bird actually flies only under very specific conditions, such as that “it is not a penguin, it is not an ostrich, it has wings, it has feathers, it is alive, etc.”¹²¹ But “birds fly” is still perfectly acceptable shorthand for describing the world, in a way that “walruses fly” is not.

The same goes for our legal language. As H.L.A. Hart (among others) pointed out more than fifty years ago, legal rules are typically stated in defeasible terms, subject to unnamed exceptions that might defeat their operation in particular cases.¹²² We say, and teach students, that a contract is valid if there was offer, acceptance, and consideration, even if it might still be invalid due to incapacity or the Statute of Frauds.¹²³ The fact that our general statements typically admit of “exceptions or qualifications,” which aren’t “captured by the

121 Giovanni Sartor, *Defeasibility in Legal Reasoning*, in *INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING* 119, 155 n.15 (Zenon Bankowski et al. eds., 1995).

122 See H.L.A. Hart, *The Ascription of Responsibility and Rights*, in *LOGIC AND LANGUAGE* (1st ser.) 145, 147–48 (Antony Flew ed., 1951) [hereinafter Hart, *Ascription*]. Hart thought this fact had further implications for moral responsibility, see *id.* at 160–66, but later abandoned that view, see H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW*, at v (1968).

123 For similar arguments, see Chesñevar, *supra* note 17, at 338; Hart, *Ascription*, *supra* note 122, at 148–50.

logical model of necessary and sufficient conditions,” doesn’t mean the initial definitions were improper.¹²⁴ Instead, we need only state what’s necessary and sufficient “in the common run of cases.”¹²⁵

When invoking these rough-and-ready statements in legal discussions, we assume that each “rule supporting a conclusion may be defeated by new information,” and we treat a chain of such reasons as an *argument*, instead of a *proof*.¹²⁶ That is how lawyers normally describe their reasoning: even the best legal briefs don’t offer formal proofs, but very strong arguments, which we hope will carry the day—unless there are better ones from the other side.¹²⁷ (For all we know, a new statute passed yesterday that makes us lose.) Rather than pursue legal certainty at all costs, we just do our best, and buy title insurance.¹²⁸

In statutory law, defeat by external rules happens all the time. When Congress creates a new cause of action, stating in unqualified language that a plaintiff “may bring an action in district court” for certain relief,¹²⁹ we don’t read that language as trumping the general four-year statute of limitations—even though the latter was enacted earlier in time, and is technically inconsistent with the new statute’s broad terms.¹³⁰ Two canons of interpretation, that the specific controls the general and the rule against implied repeal,¹³¹ prohibit read-

¹²⁴ Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 559–60 (1973); accord Leonard G. Boonin, *Concerning the Defeasibility of Legal Rules*, 26 PHIL. & PHENOMENOLOGICAL RES. 371, 375–76 (1966) (“Logical defeasibility simply indicates that it is theoretically possible that rules which may appear to be universal in application may actually have restrictions on their application.”); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 337 (1985).

¹²⁵ Neil MacCormick, *Defeasibility in Law and Logic*, in INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING, *supra* note 121, at 99, 103.

¹²⁶ Chesñevar, *supra* note 17, at 338.

¹²⁷ See generally Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992) (discussing standards of evidence for legal conclusions).

¹²⁸ Cf. Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401, 423 (2003) (comparing land registration systems, which seek “to avoid any collision of rights” by eliminating in advance “even minor contradictory rights and title clouds,” to U.S. land recording systems, in which “minor risks are often left alive and insured on a casualty basis”).

¹²⁹ See, e.g., SPEECH Act, Pub. L. No. 111-223, sec. 3(a), § 4104(a)(1), 124 Stat. 2380, 2383 (2010) (codified at 28 U.S.C. § 4104(a)(1) (Supp. IV 2010)) (“Any United States person against whom a foreign judgment is entered on the basis of the content of any . . . speech by that person that has been published, may bring an action in district court . . . for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States.”).

¹³⁰ Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5089, 5114–15 (codified as amended at 28 U.S.C. § 1658(a) (2006)) (“Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.”).

¹³¹ See, e.g., Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662–63 (2007) (describing these canons).

ing the new statute's unqualified language to override the statute of limitations.

But defeasibility isn't limited to conflicting statutes. Consider a new law providing that "any person who sends a live goose through the mails shall be imprisoned for one year." No one would take that statute to abrogate an uncodified, common law defense of duress, or of diplomatic immunity. This is true even though statutes automatically trump common law, and even though "any person" undoubtedly describes a diplomat or someone under duress. Courts routinely treat new enactments as defeasible, viewing them "in light of the background rules of the common law"¹³² unless there is "some indication of [legislative] intent, express or implied," to change those rules.¹³³ And anyone who ignores these common law doctrines, or who takes them to be abrogated by general and unqualified text, doesn't understand how our legal system works.

This practice is reflected in the traditional canon that "statutes in derogation of the common law should be strictly construed."¹³⁴ That maxim, as David Shapiro notes, has been much "maligned" and "derided," on the grounds that it privileges "judge-made law" over legislation or "frustrate[s] legislative purpose."¹³⁵ But it is "a serious mistake to view the maxim as anything but an analog to the more favorably viewed presumption against implied repeal."¹³⁶ Both canons "reflect[] the importance of reading a new statute against the legal landscape," and it is hard to imagine either without the other "in a world where common and statutory law are woven together in a complex fabric."¹³⁷ Mistaking a defeasible enactment for an absolute one not only fails to grasp the text's meaning, but also fails to respect the remainder of the law.

¹³² *Staples v. United States*, 511 U.S. 600, 605 (1994) (applying the common law rule that crimes require mens rea); see also *Brogan v. United States*, 522 U.S. 398, 406 (1998) ("Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.").

¹³³ *Staples*, 511 U.S. at 606.

¹³⁴ David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936 (1992); see also *United States v. Texas*, 507 U.S. 529, 534 (1993) (applying this canon).

¹³⁵ Shapiro, *supra* note 134, at 936; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 93 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (calling the canon "a rule of law about how legislative powers are to be exercised [that is] imposed upon the legislature by the courts"); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 52, at 3, 29 (calling the canon "a sheer judicial power-grab").

¹³⁶ Shapiro, *supra* note 134, at 937.

¹³⁷ *Id.*

To put it more generally: legal language, like all language, “is intelligible by virtue of a community’s shared conventions for understanding words in context.”¹³⁸ The “good textualist is not a literalist,”¹³⁹ but recognizes that “literal or dictionary definitions of words . . . often fail to account for settled nuances or background conventions that qualify the literal meaning.”¹⁴⁰ Some of these background conventions “are part of the English language in general,” but others are “specialized” conventions for “construing legal documents.”¹⁴¹ And one of these specialized conventions, in our society, *happens* to be that new enactments “fit into the normal operation of the legal system unless the political branches provide otherwise.”¹⁴² That is why Congress’s creation of a right to “bring an action in district court” doesn’t affect the statute of limitations, any more than it repeals jurisdictional requirements or abrogates the doctrines of estoppel or waiver. And that is also why the hypothetical statute mentioned above—mandating punishment for *any* person who sends a goose through the mail—leaves in place the common law defense of duress, just as it leaves in place “the rules of evidence, the elevated burden of persuasion, the jury,” and the basic rule that imprisonment must await trial and conviction.¹⁴³ Any of these rules can potentially

¹³⁸ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2396 (2003).

¹³⁹ Scalia, *supra* note 135, at 24.

¹⁴⁰ Manning, *supra* note 138, at 2393.

¹⁴¹ See Nelson, *supra* note 8, at 519–20; see also John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) (“[T]he Constitution should be interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it.”).

¹⁴² Frank Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999). There’s an extensive philosophical debate over whether defeasibility is a necessary feature of all legal rules. Compare, e.g., Hart, *Ascription*, *supra* note 122, at 152 (arguing that it is), with Frederick Schauer, *On the Open Texture of Law* 1–2 (Sept. 13, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1926855> (arguing that it is not). But even if defeasibility is contingent (which seems likely), it is a feature of *our* legal rules, which is all we need to know.

¹⁴³ Easterbrook, *supra* note 142, at 1913. This unremarkable fact may help address some chestnuts of legal theory. See, e.g., *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) (“Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.”); cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *91 (“Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable

defeat the application of the statute, even though they are not mentioned in its text.

2. *Why Make Law Defeasible?*

These legal and linguistic practices emerged for very good reasons. Written enactments have to function for a long time and in many circumstances. For almost any rule, there are “exceptional or abnormal conditions” under which it doesn’t apply (such as diplomatic immunity), “but their very abnormality makes it unfruitful to state the necessity for the absence of those conditions in every formulation of the right.”¹⁴⁴ Because it “would be extremely difficult, perhaps impossible, and for sure the enemy of any kind of clarity or cognoscibility in law, to attempt a formulation of every conceivable precondition of validity in every statement of every rule,” drafters sensibly “leave many background conditions unstated, especially those which arise only in rather exceptional cases.”¹⁴⁵ As a result, “any reasonable approach to systemic interpretation” must “treat legislative formulations as effectively defeasible” and as “only providing presumptively sufficient or necessary conditions as to whatever is enacted.”¹⁴⁶

This makes particular sense given the very real constraints on legislatures. Because “change is news but continuity is not,” a speaker “is likely to focus on what is being changed and to expect the listener to understand that, so far as this communication is concerned, all else remains the same.”¹⁴⁷ Expecting explicit acknowledgement of every area in which the law narrows a statute’s proper construction means asking legislators to reinvent the wheel each time—and to risk enormous legal changes if they forget something. By contrast, a statute “is more likely to be correctly understood if serious doubts are resolved against a change in existing rules or practices”;¹⁴⁸ doing so provides “the best reconstruction of what the drafters were trying *and not trying* to do.”¹⁴⁹

Ignoring defeasibility, on the other hand, strips away legislators’ ability to limit the scope of their agreements. “Almost all statutes are compromises, and the cornerstone of many a compromise is the deci-

that any man should determine his own quarrel.” (citing *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646 (K.B.)).

¹⁴⁴ McCormick, *supra* note 125, at 102.

¹⁴⁵ *Id.* at 103.

¹⁴⁶ *Id.* at 115.

¹⁴⁷ Shapiro, *supra* note 134, at 942 (footnote omitted).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 943 (emphasis added).

sion, usually unexpressed, to leave certain issues unresolved.”¹⁵⁰ Reading these “gaps” as delegations to the future, or as authorizations for judges to “solve the problem as best [they] can on [their] own,”¹⁵¹ itself assumes a degree of agreement—on the proper scope of the delegation, if nothing else—that is usually absent. Often, the best way to deal with disagreement is not to do *anything*, and to leave well enough alone. That means leaving ordinary background law in place.

3. *Defeasibility and Interpretation*

Our legal language, *in general*, is defeasible. But this claim is often mistaken for another—that individual statutes, *in particular*, contain various hidden exceptions or silent defeaters, and that discovering those exceptions is part of interpreting those statutes or giving effect to the legislature’s intent. The two claims are different as night and day, and the difference between the two is the difference between backdrops and the ordinary interpretation of text.

a. *Defeasibility Is Not Definition*

Figuring out the meaning of a text, implicit as well as explicit, is the work of interpretation. That requires reading the text under some set of linguistic conventions—those of its drafters, its enactors, hypothetical readers, modern judges, etc. And as noted above, sometimes the text (read under those conventions) includes terms of art, the meanings of which incorporate complex legal rules. Thus, John Manning has suggested that defenses such as entrapment or necessity don’t actually defeat statutory rules, but are already part of “the meaning of [the statute’s] text,” because that meaning “depends on the shared background conventions of the relevant linguistic community.”¹⁵²

But in the hypothetical goose-mailing statute above, the term “any person” is no term of art. It just means “any person.” Nobody, not even a lawyer, uses the term “any person” as *synonymous* with, say, “any person-who-is-not-under-duress-and-is-not-a-diplomat-and-is-prosecuted-within-the-statute-of-limitations-and-has-a-fair-trial-etc.” If a visiting Martian asked, “What does the phrase ‘any person’ mean in this statute?,” no one would mention duress or diplomatic

¹⁵⁰ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983); accord Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1147–48, 1188 (2009).

¹⁵¹ HART & SACKS, *supra* note 135, at 93.

¹⁵² Manning, *supra* note 138, at 2467; see also *id.* at 2467–68 (entrapment); *id.* at 2469 (necessity).

immunity, much less the procedural requirements of jury trial—unless the issue had already arisen, and the question were really about the statute’s application in practice. Criminal defenses don’t change the meanings of words; they’re defenses to the charge, not to the dictionary.

In the same way, external defeaters aren’t part of a text’s linguistic meaning; they only address the *effect* of that text within our legal system, which is not the same thing.¹⁵³ Suppose that Congress enacted a statute reading, “The First Amendment is hereby repealed.” In terms of legal effect, the statute is null and void; it’s a nothing, an empty breath. But it isn’t *meaningless*. We know precisely what it means (that the First Amendment is repealed), which is *how we know* not to give it any effect. The statute simply states a rule, the operation of which is defeated by other rules that are also part of our legal system (the First Amendment itself, and the rule that the Constitution trumps statutes). Any disagreements about whether and how to apply the statute are probably just disagreements about those external rules, not interpretive disputes about the meaning of the statute’s text.

The same is true of external rules found in statutes, or in sources of even less authority. Suppose that Congress validly authorized some administrative agency (the “Limitations Commission”) to set the federal criminal limitations period, and that the Commission chose a period of four years. If Congress then passed the goose-mailing statute, the four-year limit would still apply—even though the later-enacted statute requires the punishment of “any” violator.

Yet no one would explain that result on the ground that the phrase “any person,” correctly interpreted under the proper linguistic conventions, just *means* “any person-prosecuted-within-four-years.” (If so, then should the Commission later change its mind and shorten the period to three years, those regulations would be contrary to statute.) Nor does the statute’s linguistic meaning somehow absorb the whole administrative regime at once. (“Any person-prosecuted-within-four-years-or-a-different-time-as-prescribed-by-the-Limitation-Commission”) At some level of complexity, the claim that anyone’s language uses words this way has to fall victim to Occam’s razor.

¹⁵³ The two are sometimes distinguished under the headings of “interpretation” and “construction.” The terms are controversial, *compare* McGinnis & Rappaport, *supra* note 141, at 772–80 (criticizing construction), *with* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011) (defending it), *and* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (same), but the basic distinction needn’t be.

When we're told not to read statutes in a vacuum,¹⁵⁴ or that the law is a seamless web,¹⁵⁵ the point is that various legal rules are all supposed to interact with *each other*—not that a pre-established harmony among legal provisions has already eliminated all potential conflicts, or that each statute's linguistic meaning, on its own, already incorporates, reflects, and accounts for the entire legal universe.¹⁵⁶

Like the statute to repeal the First Amendment, the goose-mailing statute simply states a rule (applicable to any person), the operation of which may in certain cases be defeated by separate rules of different origin. The administrative regime and the resulting four-year limit represent two such rules, from which this statute does not derogate. So, although we might speak loosely of statutes as containing important exceptions that go unmentioned, their text really contains nothing of the sort. (That's what it means to go unmentioned.) Rather, the *law* contains certain exceptions, and the only question is whether the text does anything to change that.

b. Defeasibility Is Not Legislative Intent

When defeaters can't easily be smuggled into a statute's text, they're sometimes portrayed as a matter of legislative intent. For example, the Supreme Court may reason from the premise that Congress "legislates against a background of Anglo-Saxon common law," to the conclusion that "a defense of duress or coercion may well have been contemplated by Congress when it enacted [a particular statute]." ¹⁵⁷ But this conclusion doesn't follow—nor does it need to. Defeating conditions gain validity from their own status as law, not from the unenacted hopes and dreams of a prior Congress.

Consider *Dixon v. United States*.¹⁵⁸ There, the Court considered a 1968 statute that generally prohibited "any person who is under indictment" from receiving firearms,¹⁵⁹ and that prescribed punishments for "[w]hoever violates any provision of this chapter."¹⁶⁰ The Court

¹⁵⁴ See *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012).

¹⁵⁵ Cf. F.W. Maitland, *A Prologue to a History of English Law*, 14 LAW Q. REV. 13, 13 (1898) ("Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.").

¹⁵⁶ Cf. RAE LANGTON, *KANTIAN HUMILITY: OUR IGNORANCE OF THINGS IN THEMSELVES* 79 (1998) (describing "Leibniz's dizzying mirror thesis, according to which everything in the universe mirrors, or expresses, everything else").

¹⁵⁷ *United States v. Bailey*, 444 U.S. 394, 415–16 n.11 (1980).

¹⁵⁸ 548 U.S. 1 (2006).

¹⁵⁹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, sec. 902, § 922(f), 82 Stat. 197, 231 (codified as amended at 18 U.S.C. § 922(n) (2006)).

¹⁶⁰ *Id.* sec. 902, § 924(a), 82 Stat. at 233 (codified as amended at 18 U.S.C. § 924(a)).

didn't say that the meaning of "any" or "[w]hoever" incorporated common law duress doctrines. Instead, it "assum[ed] that a defense of duress is available to the statutory crimes at issue,"¹⁶¹ and then tried to determine who bears the burden of proving duress—the prosecutor or the defendant—by asking how the 1968 Congress "would have wanted us to effectuate the duress defense in this context."¹⁶² In the end, it placed the burden on the defendant, "assum[ing] that the 1968 Congress was familiar with . . . the long-established common-law rule" that defendants must prove affirmative defenses.¹⁶³

Unfortunately, as the Court admitted, there was "no evidence in the Act's structure or history that Congress *actually* considered the question."¹⁶⁴ Most likely the issue never crossed the mind of a single Member of Congress (or, to be realistic, a single committee staffer). Nobody "wanted" duress to operate in a particular way. The best justification for adhering to the common law rule is not that Congress wanted it, but that it's *part of the law*, and that it hasn't yet been repealed. Though we often speak of a presumption that drafters are aware of background law,¹⁶⁵ the real point of that presumption is to shift the burden onto the party claiming that the law has changed—to ensure that, in the "absence of contrary direction,"¹⁶⁶ the old rules will be left in place.

The convention of treating legal texts as defeasible, then, doesn't depend on whether their drafters actually considered (or even knew about) all the various defeating conditions and wanted them to apply. Usually the drafters "reach incompletely theorized agreements on a general principle," so that those "who accept the principle need not agree on what it entails in particular cases."¹⁶⁷ For example, they might agree that a certain kind of conduct should be illegal, while giving no thought to (or having conflicting opinions on) the applicable defenses and associated burdens of proof. And if the text they enact clearly presumes the *absence* of a preexisting rule, then the rule may be abrogated by implication—just as in the case of implicit repeal, where we notionally assume that Congress is mindful of the entire statute book.

¹⁶¹ *Dixon*, 548 U.S. at 13.

¹⁶² *Id.* at 16.

¹⁶³ *Id.* at 13–14.

¹⁶⁴ *Id.* at 13 (emphasis added).

¹⁶⁵ *See, e.g.*, *Hall v. United States*, 132 S. Ct. 1882, 1893 (2012).

¹⁶⁶ *Morissette v. United States*, 342 U.S. 246, 263 (1952).

¹⁶⁷ Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995) (emphasis omitted).

But to insist that unwritten defeating conditions *actually* be the subject of deliberation (or even awareness) would “enlarge the stakes of such a compromise”—making it, “in effect, all-or-nothing”—and might prevent those “compromises from forming in the first place.”¹⁶⁸ On questions that the compromises don’t address, the legislature has made no decision at all, leaving preexisting law, if any, to continue of its own force. Legislators can then focus their attention on changing things they actually want changed, avoiding “the costs of anticipating all possible interpretive problems and legislating solutions for them.”¹⁶⁹

Treating defeasibility as merely a matter of intent, by contrast, opens the door to all kinds of extratextual shenanigans based on what Congress “would have wanted us to effectuate.”¹⁷⁰ To call a legal rule “defeasible” isn’t to say that it’s defeated by *any* “ad-hoc or spur-of-the-moment” consideration, whenever doing so would “avoid a suboptimal, inefficient, unfair, unjust, or otherwise unacceptable” outcome¹⁷¹—much less to suggest that the number of such considerations is infinite.¹⁷² You can’t beat something with nothing, and a recognized rule of law found in a textual provision can only be defeated by another recognized rule of law—including a rule of common law.¹⁷³ (As Hart noted, “A rule that ends with the word ‘unless . . .’ is still a rule.”¹⁷⁴) Though the common law may be flexible, it is not infinitely so.¹⁷⁵ And in any case, it has the sanction of being *law*; if the legislature wants to change it, they only have to say so.

¹⁶⁸ Menashi, *supra* note 150, at 1188.

¹⁶⁹ Easterbrook, *supra* note 150, at 540.

¹⁷⁰ *Dixon v. United States*, 548 U.S. 1, 16 (2006).

¹⁷¹ Frederick Schauer, *Is Defeasibility an Essential Property of Law?*, in *THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY* (Jordi Ferrer Beltran & Giovanni Battista Ratti eds., forthcoming Nov. 2012) (manuscript at 10), available at <http://ssrn.com/id=1403284>; see also Richard H.S. Tur, *Defeasibilism*, 21 OXFORD J. LEGAL STUD. 355, 359 (2001) (asking “whether a rule, taken *together with all its exceptions*, might nonetheless be . . . overridden in a particular case on grounds such as mercy, justice or equity, purpose, or [nonlegal] rights” (emphasis added)).

¹⁷² Cf. Boonin, *supra* note 124, at 372 (making this suggestion).

¹⁷³ See MacCormick, *supra* note 125, at 108 (noting that defeasibility concerns only “*legally justifiable* exceptions to ordinarily necessary and presumptively sufficient conditions” (emphasis added)).

¹⁷⁴ H.L.A. HART, *THE CONCEPT OF LAW* 139 (2d ed. 1994).

¹⁷⁵ Frederick Schauer argues, in this context, that “few dimensions of justice—probably no dimensions of justice—are not instantiated by some common law principle.” Schauer, *supra* note 142, at 16. This seems to be either a heroic assessment of the common law or a narrow vision of justice. So long as there are circumstances in which the just outcome is not the law’s outcome—circumstances that occur in practice every day—the rules still have real bite. See Schauer, *supra* note 18.

4. *Our Defeasible Constitution: The Example of Legislative Entrenchment*

The same reasons to read ordinary statutes as defeasible apply with even greater force to the Constitution. The Framers had a greater need for compromise, on more important subjects, than Congress ever does. And as Chief Justice Marshall pointed out, any Constitution that exhaustively specified the necessary and sufficient conditions for its application—one that contained “an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution”—“would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”¹⁷⁶ There’s every reason to think that the Constitution was written in the same linguistic tradition as our other legal texts, and that its provisions, like those of statutes, are subject to defeat in appropriate cases by more specific rules of law. “Behind the words of the constitutional provisions are postulates which limit and control.”¹⁷⁷

What would it look like to treat our Constitution as defeasible? One example might be the rule against legislative entrenchment. This was an ancient rule of English law; as Blackstone put it, “Acts of parliament derogatory from the power of subsequent parliaments bind not.”¹⁷⁸ But it’s nowhere mentioned in the Constitution; and Eric Posner and Adrian Vermeule, breaking from the wisdom of several centuries, have argued that the rule does *not* apply to the federal government.¹⁷⁹ On their view, Congress can, and often should, place particular laws beyond the power of future Congresses to alter or repeal.¹⁸⁰ As we will see, the text may be powerless to resolve this question; fortunately, the *law* is not.

a. *Entrenchment and the Text*

The proentrenchment view has few defenders, and for good reason. Letting temporary majorities fix their statutes in unrepealable amber could have terrible, undemocratic consequences. But Posner and Vermeule think it would have wonderful, prodemocratic consequences.¹⁸¹ As John McGinnis and Michael Rappaport noted in reply,

¹⁷⁶ *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

¹⁷⁷ *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

¹⁷⁸ 1 BLACKSTONE, *supra* note 143, at *90.

¹⁷⁹ See Posner & Vermeule, *supra* note 15.

¹⁸⁰ See *id.* at 1666.

¹⁸¹ See *id.* at 1670–73.

the kind of “structural evidence” that points one way or another “does not by itself supply a way of reading the *text* to further this purpose.”¹⁸²

Indeed, it’s far from obvious that there *is* a way of reading the text to adopt the antientrenchment rule. Suppose, as a thought experiment, that the historical tradition at the Founding had been *proentrenchment*—that entrenched legislation was regarded as perfectly ordinary and useful. In that case, what in the Constitution’s text would signal disapproval of this practice?

Some have argued that entrenchment contradicts the procedures of Article I, Section 7, because it “prevent[s] a Congress from enacting laws through this procedure.”¹⁸³ But this argument mistakes a substantive bar for a procedural one. An entrenching clause doesn’t change how a bill becomes a law; it just means that in case of conflict between some new law and an entrenched one, the older statute trumps. To say the later Congress must be able to make its laws *effective* in the future is to beg the question. (One could make the same argument against the *antientrenchment* rule, because the prior Congress can’t use Section 7’s procedures to make *its* laws effective in the future, given the threat of repeal.)

Nor do entrenched laws contradict the enumerated powers in Article I, Section 8. Saying that “[t]he Congress shall have Power”¹⁸⁴ to do various things doesn’t specify *which* Congress, over time, will exercise that power.¹⁸⁵ And entrenching a law in place doesn’t “destroy[] the legislative power”¹⁸⁶ with respect to particular subjects, but *exercises* that power in a particular way. If the historical tradition at the Founding had encouraged entrenchments, and if the Framers wanted to leave that regime in place, they could have used exactly the same language in Article I, Section 8.

The same goes for Article V. Permitting entrenchments through ordinary legislation might be in tension with the “extremely strict” process for constitutional amendments.¹⁸⁷ But if entrenched legislation at the Founding was commonplace and approved, then maybe a strict amendment process was necessary to keep people from overrid-

¹⁸² McGinnis & Rappaport, *supra* note 15, at 396.

¹⁸³ See John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1784 (2003).

¹⁸⁴ U.S. CONST. art. I, § 8, cl. 1.

¹⁸⁵ See Posner & Vermeule, *supra* note 15, at 1674.

¹⁸⁶ Roberts & Chemerinsky, *supra* note 183, at 1784.

¹⁸⁷ McGinnis & Rappaport, *supra* note 15, at 395.

ing their entrenched legislation too easily. The textual arguments all cut both ways.

If anything, in a vacuum, the text might even be thought to *favor* entrenchments. An unrepeatable regulation of commerce still regulates commerce,¹⁸⁸ and a law that permanently “establish[es] Post Offices and post Roads”¹⁸⁹ is merely one more way to establish them. And what about Congress’s power over federal enclaves, where it can “exercise exclusive Legislation in *all Cases whatsoever*”?¹⁹⁰ The general words of Article I have no limitation as to repeal; and if the text were all we had, there’d be no reason to find one.

b. Entrenchment and Linguistic Meaning

Of course, the text isn’t all we have. There is very strong historical evidence that the Founding generation believed, as we do, that entrenchments were prohibited.¹⁹¹ And it may well be that many parts of the Constitution’s text were designed with this belief in mind. But there still must be some explanation of why this wasn’t just one more of the Framers’ unenacted hopes and dreams—why the historical rule is binding on us today, should our elected Congress choose to depart from it.

One possible explanation would insert the historical rule into the meaning of the Constitution’s language. Article I vests “[a]ll legislative Powers herein granted” in Congress,¹⁹² and McGinnis and Rappaport question whether “‘legislative power’ encompasses the authority to pass entrenched legislation.”¹⁹³ They conclude that the term “is ambiguous: While it could mean the power to pass legislation, including statutes that entrench, it might also mean the power to enact only ordinary, nonentrenched legislation.”¹⁹⁴ Because terms “refer[ring] to the powers exercised by institutional entities[] are often comprehended by reference to prior exercises of that authority,”¹⁹⁵ and because the exercises of authority in the Founding generation followed the antientrenchment rule, they conclude that “informed persons would have understood one meaning of ‘legislative power’ as

¹⁸⁸ See U.S. CONST., art. I, § 8, cl. 3.

¹⁸⁹ *Id.* cl. 7.

¹⁹⁰ *Id.* cl. 17 (emphasis added).

¹⁹¹ See, e.g., Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1029–33 (2011); McGinnis & Rappaport, *supra* note 15, at 393–94, 400–08.

¹⁹² U.S. CONST. art. I, § 1.

¹⁹³ McGinnis & Rappaport, *supra* note 15, at 392.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 393.

excluding the authority to entrench,” and that this was the meaning adopted in the Constitution.¹⁹⁶

But it’s not clear that these words were actually used in two senses. We can speak of “legislative power over red things,” and “legislative power over green things,” but that doesn’t make the *phrase* “legislative power” ambiguous as to color. To say that “legislative power” was ambiguous as to entrenchment is to say that people used the phrase—as a *phrase*—not just to mean “the power to make laws,” in general, but also to mean “the power to make repealable laws only,” in particular. That requires evidence of usage, which McGinnis and Rappaport don’t provide; the phrase “legislative power” doesn’t appear in the historical quotations they offer.¹⁹⁷ Their historical evidence is powerful, but it concerns applications of the rule itself, not the meanings of particular words. (When Blackstone said that “[a]cts of parliament derogatory from the power of subsequent parliaments bind not,”¹⁹⁸ he was saying that the acts didn’t *bind*, not that they weren’t “acts.”) So Posner and Vermeule can legitimately ask why, even if “the Framers assumed entrenching statutes to be invalid, that evidence would demonstrate [any] more than a background assumption at the level of specific intentions, an assumption untethered to any particular constitutional text.”¹⁹⁹

Another way of hooking the antientrenchment rule to the text would be to call it a substantive canon of construction, which affects how lawyers read a specialized text.²⁰⁰ But it’s not clear that the rule was actually conceptualized this way. Its most famous formulation addressed Parliament,²⁰¹ which had no document defining its powers that needed interpreting. The rule is fundamentally about legislatures and what they can do, not about words and how we should read them. Additionally, treating the rule as a subject-specific canon of construction would subject it to the usual criticism of such canons—namely, that they’re more “formalized versions” of ad hoc exceptions based on what we think the authors might have wanted.²⁰²

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., *id.* at 393 (quoting Blackstone); *id.* at 405 & n.71 (Jefferson); *id.* at 406 (Madison).

¹⁹⁸ 1 BLACKSTONE, *supra* note 143, at *90.

¹⁹⁹ Posner & Vermeule, *supra* note 15, at 1677.

²⁰⁰ On such canons, see John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 436 & nn.55–57 (2005).

²⁰¹ See 1 BLACKSTONE, *supra* note 143, at *90.

²⁰² Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 466 (2005).

c. Entrenchment and Defeasibility

A better answer may lie in the concept of defeasibility. Just as common law duress can defeat a criminal statute, a rule unconnected to the constitutional text can operate in ways that have constitutional significance. The antientrenchment rule wasn't just an "assumption" about future practice,²⁰³ but a recognized rule of law, "followed as a matter of legal obligation rather than simply as a matter of good policy."²⁰⁴ This meant it could operate of its own force, without needing a textual hook.

As a rule of law, moreover, the antientrenchment rule would have survived the adoption of the Constitution. Because the Constitution's language is defeasible, a general grant of power to regulate commerce or establish post offices wouldn't have overcome the antientrenchment rule, any more than a ban on "any person" mailing geese overrides the law of duress. And we wouldn't need any special-purpose interpretive canon, either: the text offers no grounds for finding a derogation from the common law default.

The idea of antientrenchment as a default rule was expressed openly at the Founding. In Virginia, for example, the 1785 Act for Establishing Religious Freedom claimed to declare eternal natural rights, but it also recognized that "this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law."²⁰⁵ The key language here is "ordinary purposes": if Virginians wanted their legislature to be able to entrench, they would have to make some special indication to that effect. A general delegation of legislative power wouldn't do the job, because it wouldn't impliedly repeal the usual constraints on a legislature's powers.

This leaves the final requirement for a backdrop: that the rule be immune from the usual methods of legal change. If the antientrenchment rule is a rule of common law, and statutes can abrogate the common law, can Congress give itself the power of entrenchment? Congress has overturned other common law interpretive practices,

²⁰³ Posner & Vermeule, *supra* note 15, at 1677.

²⁰⁴ McGinnis & Rappaport, *supra* note 15, at 396 n.31.

²⁰⁵ Act for Establishing Religious Freedom § 3 (Va. 1785), in 5 THE FOUNDERS' CONSTITUTION 84, 85 (Philip B. Kurland & Ralph Lerner eds., 1987).

such as the rules governing revival of repealed statutes.²⁰⁶ So what makes the antientrenchment rule special?

Unlike other common law rules that state a substantive rule of decision, the antientrenchment rule operates at the level of the legislature's *authority*. It "was justified by the view that legislatures *did not possess th[e]* authority" to entrench their statutes.²⁰⁷ The rule acts as a defeater to a grant of legislative power, as well as to its exercise. As long as the antientrenchment rule is in effect, a general authorization to make laws won't confer a power to entrench them—any more than a general authorization to try causes in the manor of Dale confers the power to be a judge in one's own cause.²⁰⁸ The antientrenchment rule is a limit on Congress's powers as a whole, and it can't be overcome by a statute passed under those powers. As Madison put it, "It is not in our power to guard against a repeal. Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which *no* provision can be made."²⁰⁹

So, even if we agreed with Posner and Vermeule that entrenchments are good policy, it's not clear how we'd enact them. The antientrenchment rule is still in effect, and Congress can't abrogate it by statute, because it lacks enumerated power to do so. The rule already operates to limit the Article I grant, meaning that the power to make unrepealable laws isn't among Congress's "legislative Powers"—not as a matter of linguistic meaning, but simply as a matter of historical fact. And no other actor (the President, judges, the states) can plausibly override the antientrenchment rule either. Thus, even though the rule can't be derived from the Constitution, it limits the power conferred by the Constitution, and can't itself be changed without a constitutional amendment.

If these arguments are right, and the antientrenchment rule is a backdrop, then it's not as surprising that so fundamental a rule might have been left out of the Constitution's text. Viewing the rule as a backdrop could also explain how it might be abrogated by particular constitutional provisions in particular cases. For example, Congress can "borrow Money on the credit of the United States,"²¹⁰ but no fu-

²⁰⁶ See 1 BLACKSTONE, *supra* note 143, at *90 (suggesting that "[i]f a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived"); see also 1 U.S.C. § 108 (2006) (stating the opposite presumption); cf. Posner & Vermeule, *supra* note 15, at 1675 (mentioning this example).

²⁰⁷ McGinnis & Rappaport, *supra* note 15, at 393 (emphasis added).

²⁰⁸ See 1 BLACKSTONE, *supra* note 143, at *91.

²⁰⁹ 2 ANNALS OF CONG. 1666 (1790) (statement of Rep. Madison) (emphasis added).

²¹⁰ U.S. CONST. art. I, § 8, cl. 2.

ture Congress can “question[]” the “validity of th[is] public debt.”²¹¹ One Congress can grant federal land to a private citizen, but the Takings Clause stops the next Congress from grabbing it back without compensation.²¹² And if the Twenty-Eighth Congress admits Texas as one state instead of five,²¹³ the Twenty-Ninth Congress has only a limited ability to change its mind.²¹⁴ These provisions do produce limited forms of entrenchment, but that doesn’t mean they contradict any other parts of the text—or that Congress is using something other than “legislative Powers” when it acts under them. Rather, these specific provisions overcome, in particular cases, the rule against legislative entrenchment, in a way that general delegations of legislative power do not.

II. HOW ARE BACKDROPS USEFUL?

The previous Part set out a theory of backdrops and explained how they could have legal force notwithstanding their absence from the text. This Part seeks to illustrate what work backdrops might do. Looking at the major structures of our government, it identifies one disputed constitutional issue as to each—the Houses’ contempt power, the President’s removal power, the courts’ use of stare decisis, and the states’ immunity from suit—and explains how we might understand these issues better through the lens of backdrops. In each category, it also identifies potential directions for future research to which backdrops might apply. The discussion is necessarily shorter than its subjects merit, and this Article can’t claim to resolve any of these disputes, much less all of them. But it does seek to show that backdrops could prove to be a very useful tool.

A. *Backdrops and the Legislature*

1. *The Contempt Power*

Each House of Congress has the power to “punish its Members for disorderly Behaviour.”²¹⁵ For more than 200 years, though, the Houses have claimed inherent power to punish *non*-Members for contempt of Congress—private citizens as well as government officials.²¹⁶

²¹¹ *Id.* amend. XIV, § 4.

²¹² *Id.* amend. V.

²¹³ See Joint Resolution for Annexing Texas to the United States § 2 Third, 5 Stat. 797, 798 (1845) (permitting up to five states in the annexed territory).

²¹⁴ On dividing states, see generally U.S. CONST. art. IV, § 3, cl. 1; Kesavan & Paulsen, *supra* note 61.

²¹⁵ U.S. CONST. art. I, § 5, cl. 2.

²¹⁶ See, e.g., *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (upholding this power); JOSH

And the Houses don't depend on the Executive and the courts to punish these offenders: they've claimed authority to send their own Sergeants-at-Arms to make arrests, and to detain suspects in a jail located inside the Capitol building.²¹⁷ On at least two occasions, the House of Representatives has actually arrested officers of the executive branch.²¹⁸

This is a remarkable power, and one might wonder where it was conferred in the Constitution. Though a proposal to add it was made at Philadelphia,²¹⁹ it wasn't included in the text—and a barrage of provisions might raise inferences against it.²²⁰ Nonetheless, when the first case on the subject reached the Supreme Court, the House of Representatives' power was upheld, primarily on structural considerations: if the House couldn't punish on its own, it would be unable “to guard itself from contempts,” and would be left “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it.”²²¹ A decade later, Joseph Story found it “remarkable” that the contempt power wasn't mentioned in the Constitution.²²² But he found it “obvious” that one “exists by implication,” for it would be “utterly impossible for either house to perform its constitutional functions” or “to conduct its own deliberations, if it may not keep out, or expel intruders.”²²³ Josh Chafetz, in an extensive study, has likewise suggested that “it is difficult to imagine a legislative body functioning

CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 222–34 (2007) [hereinafter CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW*] (documenting this history); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 735 (2012) [hereinafter Chafetz, *Congress's Constitution*] (same); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1128–43 (2009) [hereinafter Chafetz, *Executive Branch Contempt*] (same); see also TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, *CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE* 4–18 (2012).

²¹⁷ See Chafetz, *Congress's Constitution*, *supra* note 216, at 737 & n.117.

²¹⁸ See Chafetz, *Executive Branch Contempt*, *supra* note 216, at 1135–39.

²¹⁹ See 2 FARRAND'S RECORDS, *supra* note 1, at 341.

²²⁰ See, e.g., U.S. CONST. art. I, § 1 (limiting Congress to “legislative Powers herein granted”); *id.* § 3, cl. 7 (limiting Congress to intangible sanctions “in Cases of Impeachment”); *id.* § 5, cl. 2 (naming specific parliamentary privileges, but not this one); *id.* § 6, cl. 1 (same); *id.* § 9, cl. 3 (forbidding bills of attainder); *id.* art. II, § 1, cl. 1 (vesting the “executive Power” in the President); *id.* art. III, § 1 (vesting the “judicial power” in the courts); *id.* amend. V (prohibiting deprivations of “liberty . . . without due process of law”); *id.* amend. X (imposing a rule of construction hostile to implied federal powers).

²²¹ *Anderson*, 19 U.S. at 228.

²²² 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 842, at 305 (Bos., Hilliard, Gray & Co. 1833).

²²³ *Id.*

effectively without some such power [T]he ability to punish non-Members is structurally inherent in the very concept of a legislature; spelling it out in the document would simply have been redundant.”²²⁴

That said, not everyone agreed on the strength of that structural case. Jefferson, for example, argued in his famous *Manual of Parliamentary Practice* that it was enough for Congress to criminalize contempts—and that even without such a law, “the ordinary magistrates and courts of law [were] open and competent to punish all unjustifiable disturbances or defamations.”²²⁵ Likewise, St. George Tucker criticized the practice as violating the separation of powers and various constitutional rights.²²⁶

This Article takes no view of which side was right. But there’s another way to think about the contempt power. Although the defenses of this power were primarily structural in nature, its supporters also relied on the existence of similar powers in the British Parliament, as well as in the legislatures of the colonies and of the several states. The Supreme Court, for example, noted that these “rights and powers . . . had been established by long practice, and conceded by public opinion.”²²⁷ Likewise, Story argued that “by the common law, the power to punish contempts of this nature belongs incidentally to courts of justice, and to each house of parliament,” and that “[n]o man ever doubted, or denied its existence, as to our colonial assemblies in general.”²²⁸

In fact, if such a power had never been exercised or suggested before, it’s hard to imagine that anyone would have accepted it on structural reasoning alone. But supposing that such a power traditionally belonged to legislatures at common law, and that the Constitution neither altered nor abrogated that rule, then the Houses of Congress might still hold that power—not as a consequence of any provision in the text, but simply as a common law rule that continues in force. (As Chafetz notes, once the power had “crossed the Atlantic,” it was

²²⁴ CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW*, *supra* note 216, at 212.

²²⁵ THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES* § 3.5, at 7 (Wash., U.S. Gov’t Printing Office 1993) (1801).

²²⁶ See 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* app. D, at 200 n.§ (Phila., William Young Birch & Abraham Small 1803).

²²⁷ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 232 (1821).

²²⁸ 2 STORY, *supra* note 222, § 843, at 306–07; see also *Ex parte Nugent*, 18 F. Cas. 471, 482 (C.C.D.C. 1848) (No. 10,375) (“It is not at all probable that the framers of the constitution, by giving [certain] express power[s] . . . , intended to deprive the senate of that protection from insult which they knew very well belonged to and was enjoyed by both houses of parliament and the legislatures of the former colonies and now states of this Union.”).

thought to apply to legislatures in general, even in states whose constitutions didn't mention it.²²⁹) Moreover, because each House has power to "determine the Rules of its Proceedings" without interference by the other House,²³⁰ then maybe each House's individual exercise of the contempt power can't be prevented, even by legislation. In that case, the contempt power might have the status of a constitutional backdrop.

Viewing the contempt power as a backdrop would also provide some guidance on its scope. For example, the Supreme Court has said that punishments imposed by the Houses can't exceed the "known and acknowledged limits of fine and imprisonment,"²³¹ and Story said no punishment could last beyond the legislative session.²³² Though structural reasons might support these limits as well, the fact that they applied to the common law contempt power is strong evidence that Congress can't exceed them.

And the lens of backdrops might help explain how the power changed in form as it migrated from Britain to the United States. Americans never adopted the common law wholesale, but only "so far as it was applicable to their new situation."²³³ This raises interesting questions as to whether, for example, differences between British and American legislatures affected the latter's reception of this common law rule. It also helps to identify cases in which the traditional practices might have been abrogated by new constitutional rules. So, with a First Amendment in place, we might well condemn the Senate's 1800 contempt citation of a critical newspaper publisher,²³⁴ while accepting other exercises of atextual legislative privilege that aren't inconsistent with the written Constitution.

2. *Future Directions*

Within the legislative field, the contempt power is one area where backdrops might prove useful—but it isn't the only one. A backdrops analysis might also help explain the procedures the Houses of Congress must follow before establishing their own rules. Each House has the power to "determine the Rules of its Proceedings."²³⁵ But when a

²²⁹ Chafetz, *Executive Branch Contempt*, *supra* note 216, at 1143.

²³⁰ U.S. CONST. art. I, § 5, cl. 2.

²³¹ *Anderson*, 19 U.S. at 228.

²³² 2 STORY, *supra* note 222, § 846, at 316.

²³³ *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8411).

²³⁴ See CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW*, *supra* note 216, at 225.

²³⁵ U.S. CONST. art. I, § 5, cl. 2.

new House of Representatives convenes, and hasn't yet adopted any rules, it's governed by traditional rules of "general parliamentary law"²³⁶—because there's nothing else to apply. This fact presents a familiar scenario: a body of law applies that's found nowhere in the Constitution, wasn't altered by the Constitution, and isn't easily changed. (Of course, the assembled representatives will override this law once they establish their own rules. But they can't stop the general parliamentary law from applying to the *next* House until *that* House acts.²³⁷)

And backdrops may help illuminate less familiar corners of legislative procedure—such as whether members of the House of Representatives have the right to resign without the House's permission.²³⁸ Traditional practice in Britain, the colonies, and the early states was that they did not; having been chosen by the People, representatives couldn't easily abandon their charge.²³⁹ The Constitution did nothing to alter this rule, and may even confirm it: the text speaks generally of "vacancies happen[ing]" in the House,²⁴⁰ but specifically clarifies that vacancies may "happen by Resignation or otherwise" in the Senate.²⁴¹ And if the consent requirement is indeed still in effect, the text may insulate it from change: the House might *grant* its members a general permission to resign (or might do so implicitly), but it can always revoke that permission under its power to set the "Rules of its Proceedings."²⁴² In other words, the rule may take the structure of a backdrop.

²³⁶ H.R. Doc. No. 111-157, § 60, at 26 (2011); accord John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 491 n.40 (1995) (describing this law as "legislative common law").

²³⁷ The Senate, by contrast, has traditionally been thought to be a "continuing body," governed by the rules of the previous session. See generally Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401 (2010) (describing this tradition and calling for reform).

²³⁸ See generally Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177 (2008).

²³⁹ See *id.* at 184–204.

²⁴⁰ U.S. CONST. art. I, § 2, cl. 4.

²⁴¹ *Id.* § 3, cl. 2; see also Chafetz, *supra* note 238, at 214–15 ("[T]he background norms from the British Parliament, carried through the colonial and state legislatures and the Continental Congress, are clear that members have no right to resign, and nothing in the Founding-era history evinces a desire to do away with those norms.").

²⁴² U.S. CONST. art. I, § 5, cl. 2.

B. Backdrops and the Executive

1. The Removal Power

Article II vests “[t]he executive Power” in the President.²⁴³ But the meaning of that grant has never been clear. As John Manning describes, “the Constitution’s structural provisions,” as expressed in the literal text, “leave many important questions unaddressed.”²⁴⁴ For example, does the President have the power to remove executive officers at will?²⁴⁵ Or may Congress place limitations on that authority?²⁴⁶

These questions have been asked since the dawn of the Republic,²⁴⁷ and this Article won’t answer them now. Instead, it describes one popular argument made in the removal debate and shows how that argument fits the conceptual framework of a backdrop.

In a speech in the First Congress during its debates over removal, Madison made the following four claims. First, the Constitution’s Vesting Clauses left each branch “in the entire possession of the powers incident to that department,” except as otherwise specified in the text.²⁴⁸ Second, the powers of appointing and removing executive officers were powers incident to the Executive, being “of an Executive nature.”²⁴⁹ Third, although the appointment power was partly withdrawn from the President by the Appointments Clause (which requires Senate consent for certain officers),²⁵⁰ the removal power hadn’t been “excepted out of the general rule.”²⁵¹ And fourth, if a particular power had been vested in the President, Congress couldn’t “diminish or modify” it by legislation.²⁵² Thus, “inasmuch as the power of removal is of an Executive nature, and not affected by any Constitutional exception,” Madison thought it “beyond the reach of the Legislative body.”²⁵³

²⁴³ *Id.* art. II, § 1, cl. 1.

²⁴⁴ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945 (2011).

²⁴⁵ *See, e.g.,* *Myers v. United States*, 272 U.S. 52 (1926).

²⁴⁶ *See, e.g.,* *Morrison v. Olson*, 487 U.S. 654 (1988).

²⁴⁷ *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (describing debates in the First Congress).

²⁴⁸ 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

²⁴⁹ *Id.*

²⁵⁰ U.S. CONST. art. II, § 2, cl. 2.

²⁵¹ 1 ANNALS OF CONG., *supra* note 248, at 463 (statement of Rep. Madison).

²⁵² *Id.*

²⁵³ *Id.* at 464.

These claims precisely model the structure of a backdrop. Madison wasn't saying that removal is part of "[t]he executive Power" as a matter of linguistic meaning—that is, that "executive Power" was simply *synonymous* with "the power-to-do-*X*-and-*Y*-and-*Z*-and-to-appoint-and-remove-officers-at-will." (If the two were synonyms, then the Vesting Clause and the Appointments Clause would have directly contradicted each other—like saying in Section 1 that "the President shall be tall, dark, and handsome," and then in Section 2 that "the President shall not be tall."²⁵⁴) Instead, Madison seemed to treat "executive Power" as roughly synonymous with "all the powers 'incident' to the Executive," an incorporation by reference of an externally defined set of powers. And he thought that appointment and removal happened to be among those powers—not as a matter of language, but as a matter of historical fact.²⁵⁵

The rest of Madison's inquiry then proceeded in what should now be a familiar way. Was removal a power incident to the Executive, or not? Which of those incidental powers, if any, did other provisions of the text take away?²⁵⁶ And if the removal power wasn't taken away by the text, did Congress have any power to limit it?

For Madison, this argument was only one part of a broader framework for separation of powers, in which the powers ordinarily incident to each branch remained with that branch unless otherwise specified.²⁵⁷ In a speech later the same month, he explained the three Vesting Clauses as a background commitment to a conventional grouping of government powers, which might then be modified by more specific provisions elsewhere in the text.²⁵⁸ Because the legislative powers were vested in Congress "under certain exceptions, and the Executive power vested in the President with certain exceptions, we must suppose they were intended to be kept separate in all cases in which they are not blended."²⁵⁹ He analogized the federal structure to

²⁵⁴ See *supra* text accompanying note 97.

²⁵⁵ Of course, once we're sure Madison's interpretation is correct, we can imagine replacing "[t]he executive Power" with a long laundry list of executive powers without changing much by way of application—just as we can imagine the Seventh Amendment spelling out all the rules of the common law relevant to jury trial. But that's getting ahead of ourselves. The meaning of the phrase and of the laundry list are very different, with consequences for the kinds of evidence relevant to interpreting the text.

²⁵⁶ For example, when Congress vests inferior officer appointments in persons other than the President, maybe it vests power to remove those officers as well. See U.S. CONST. art. II, § 2, cl. 2; *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839).

²⁵⁷ 1 ANNALS OF CONG., *supra* note 248, at 497 (statement of Rep. Madison).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

that of the majority of states, which had sought to keep “the three great departments of Government . . . separate and distinct.”²⁶⁰ Madison well knew that the states and the federal Constitution had allocated particular powers differently; but he explained that, “if in any case they are blended, it is in order to admit a partial qualification, in order more effectually to guard against an entire consolidation.”²⁶¹

This theme was expressed by other members of the Founding generation as well. Hamilton, as *Pacificus*, defended President Washington’s Neutrality Proclamation by describing it as “[t]he general doctrine” of the Constitution “that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qu[al]ifications which are expressed in the instrument.”²⁶² Hamilton noted that the President had received “the Executive Power,” and not (like Congress) merely an enumerated set of powers “herein granted.”²⁶³ The implication, according to “the rules of sound construction,” was that the “enumeration of particular authorities” in Article II did not “derogat[e] from the more comprehensive grant” in the Vesting Clause “further than as it may be coupled with express restrictions or qualifications”—such as Article II’s requirements that the Senate participate in appointments and treaties.²⁶⁴ In other words, the President received everything that ordinarily would be categorized as executive power, with occasional additions and subtractions throughout the text. And Hamilton described that “mode of construing the Constitution” as having been “recognized by Congress,” in particular through the debate over “[t]he power of removal from office.”²⁶⁵

This isn’t the only way one could view the separation of powers. Manning, for example, describes the generality of the Executive Vesting Clause as part of a “common drafting strategy to elide disagreement or deal with hard-to-predict futures,” one that “leaves much to be decided by those charged with implementing the provisions in

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Alexander Hamilton, *Pacificus, No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 39 (Harold C. Syrett ed., 1969) (emphasis omitted).

²⁶³ *Id.* (emphasis omitted) (internal quotation marks omitted).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 40; see also TUCKER, *supra* note 226, app. D, at 203 n.8 (describing it as “uniformly the policy . . . and one of the fundamental principles of the American governments” that legislative, executive, and judicial powers should be kept “for ever separate and distinct, except in the cases positively enumerated”). See generally *Myers v. United States*, 252 U.S. 53, 137–39 (1926) (adopting this interpretive approach); MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 51–90 (2007) (presenting additional historical evidence for this view).

question.”²⁶⁶ Whatever was “left undecided” in the text was actually “left for Congress to decide,”²⁶⁷ through its general power under the Necessary and Proper Clause to carry “into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁶⁸

Hamilton offered a different picture. He also recognized “the difficulty of a complete and perfect specification of all the cases of Executive authority.”²⁶⁹ Yet the solution to that problem wasn’t to give Congress free rein; it was to incorporate by reference a preexisting, conventional division of powers, except where otherwise specified. The problem’s scope “naturally dictate[d] the use of general terms,” but that counsels *against* a reading that turns general terms into empty ones, taking the “specification of certain particulars . . . as a substitute for those [general] terms, when antecedently used.”²⁷⁰ On Hamilton’s view, when a claim of presidential power is advanced, the initial question is whether the power is among those generally conferred on the Executive, and the next question is whether the Constitution specifically assigned it anywhere else.

The arguments above aren’t necessarily the right ones. It is possible that, although the Founding generation repeatedly expressed a commitment to the separation of powers,²⁷¹ they had so little actual agreement on which powers were incident to which branch that their commitment to separation was vacuous.²⁷² But if Hamilton’s picture is

²⁶⁶ Manning, *supra* note 244, at 1985–86.

²⁶⁷ *Id.* at 2017.

²⁶⁸ U.S. CONST. art. I, § 8, cl. 18.

²⁶⁹ Hamilton, *supra* note 262, at 39.

²⁷⁰ *Id.*

²⁷¹ See, e.g., MASS. CONST. art. XXX (1780), in 1 THE FOUNDERS’ CONSTITUTION, *supra* note 205, at 11, 13–14 (“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”); VA. DECL. RTS. art. V (1776), in 1 THE FOUNDERS’ CONSTITUTION, *supra* note 205, at 6, 6 (providing “[t]hat the Legislative and Executive powers of the State should be separate and distinct from the Judicative”).

²⁷² See Manning, *supra* note 244, at 2015. Diversity of practice among the states isn’t necessarily evidence that their doctrines were confused. In *The Federalist*, Madison responded to criticisms that the draft Constitution assigned the powers erroneously by pointing out how often the states had *also* departed from the canonical division in particular cases. See THE FEDERALIST NO. 47, *supra* note 41, at 323, 328 (James Madison). This argument only works if the reader *shares* the canonical understanding of which functions normally accrue to which branches. For instance, Madison pointed out that Massachusetts let the legislature make appointments, even though it also had an explicit separation of powers clause. *Id.* He concluded that, “[a]s the appointment to offices, particularly executive offices, is *in its nature an executive function*, the

right, the fact that the Vesting Clauses *themselves* are generally worded, and that their legal consequences “will *never* be evident from the raw text,”²⁷³ shouldn’t worry us overmuch. The Seventh Amendment’s reference to “the rules of the common law” is also general, and its consequences can’t be determined from the text alone, but this doesn’t simply hand the decision over to Congress. What matters is whether the Vesting Clauses refer to some external standard—and whether we can find out what that standard requires.

2. *Future Directions*

Getting some answers on removal would be useful enough. But reading the Executive Vesting Clause as a backdrop would have a significance far beyond removal. For example, it could have substantial consequences for allocating powers over foreign affairs, some of which may have been considered “executive” at the Founding.²⁷⁴

The same goes for the distribution of war powers between Congress and the President. Though some of these powers are addressed in specific clauses of the Constitution, others may have been left to the general language of the Vesting Clause.²⁷⁵ The absence of specific text, then, needn’t end the historical inquiry.

C. *Backdrops and the Judiciary*

1. *Stare Decisis*

The doctrine of stare decisis has produced rivers of academic ink but little agreement. Some hold that stare decisis might be unconstitutional, if it elevates judge-made law over the sources listed in the Supremacy Clause.²⁷⁶ Others say that stare decisis is constitutionally required, whatever status it may have had in the past.²⁷⁷ Some claim

compilers of [the state constitution] have in this last point at least, violated the rule established by themselves.” *Id.* (emphasis added).

²⁷³ Manning, *supra* note 244, at 2021.

²⁷⁴ For a general discussion of these issues, see RAMSEY, *supra* note 265; Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

²⁷⁵ See generally RAMSEY, *supra* note 265, at 218–56 (discussing war powers); Michael D. Ramsey, Response, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007) (same).

²⁷⁶ See, e.g., Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1 (2011).

²⁷⁷ See Fallon, *supra* note 21, at 580.

that the use of stare decisis is consistent with originalist interpretation;²⁷⁸ others disagree.²⁷⁹

One of the most confusing aspects of stare decisis, however, is what *kind* of law it is. It's not mentioned in the Constitution, wasn't established by statute, and hasn't been promulgated through rules of court. So where does stare decisis come from, and why do courts apply it?²⁸⁰

Some argue that the Constitution requires stare decisis as an aspect of the "judicial Power"²⁸¹ vested in the federal courts. According to a panel of the Eighth Circuit in *Anastasoff v. United States*, the Framers believed that doctrines of precedent "derive[d] from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution."²⁸² Thus, an appellate court that seeks "to avoid the precedential effect of [its] prior decisions" (including unpublished decisions) exercises a power beyond that granted by Article III.²⁸³

This argument rests on a claim that stare decisis was part of the linguistic meaning of "judicial Power"—that the term "judicial Power" just *meant*, or was *synonymous* with, "the power to decide cases by using (among other things) the doctrine of stare decisis." This is a very aggressive claim in light of the evidence. Taken seriously, this claim would mean, for example, that Framing-era lawyers must have spoken of tribunals in civil law countries, "which did not have the common law doctrine of precedent, [as] exercising something other than judicial power."²⁸⁴ It's also hard to square with American practice: district courts wield the "judicial Power" no less than the courts of appeals, yet they typically don't follow their own precedents, much less the precedents of coordinate courts from other circuits.

²⁷⁸ See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

²⁷⁹ See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

²⁸⁰ This Article doesn't address Richard Fallon's suggestion that stare decisis supplies its own legal basis, and is constitutionally required for reasons "partly independent of the language . . . of the written Constitution." Fallon, *supra* note 21, at 588.

²⁸¹ U.S. CONST. art. III, § 1.

²⁸² 223 F.3d 898, 900 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

²⁸³ *Id.*

²⁸⁴ Harrison, *supra* note 97, at 522. A more plausible reading might treat "judicial Power" as meaning only "the power to issue binding judgments . . . within the court's jurisdiction," without specifying the rules of decision or what that jurisdiction will be. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1811 (2008).

Instead of hard-coding stare decisis into the language of the Constitution, an alternative story might analyze the doctrine as a backdrop. Stare decisis might simply be a recognized common law doctrine, a “principle of policy”²⁸⁵ assisting courts in going about their business—a heuristic that helps simplify decisionmaking. Having (allegedly) been in effect at the time of the Founding, as “one of the well-understood background assumptions of the common law, against which the Framers might be thought to have been drafting, and [which] went unspoken because all assumed it to be true,”²⁸⁶ it therefore continues to be in effect today.

Assuming that this depiction is historically accurate,²⁸⁷ two important questions would arise. First, if the Founders recognized certain constraints on the doctrine of stare decisis, do those constraints still apply? Though the Court has said repeatedly (and unanimously) that “[s]tare decisis is not an inexorable command,”²⁸⁸ we’re also told that “the doctrine carries such persuasive force” that any overruling requires a “special justification”²⁸⁹—for instance, that past precedent is simply “unworkable.”²⁹⁰ By contrast, Caleb Nelson has argued that the traditional presumption against overruling “did not apply if the past decision, in the view of the court’s current members, was demonstrably erroneous.”²⁹¹ To justify overruling a case, it could be enough to give a demonstration that the prior opinion was wrong²⁹²—at which point the burden would shift, and a court would consider if there were any “special justification for adhering to it” (such as reliance).²⁹³ If stare decisis applies today only by virtue of its historical common law pedigree, must its current degree of “persuasive force” be justified by that pedigree as well? What warrant might a court have for giving it any greater or lesser degree?

²⁸⁵ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

²⁸⁶ Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1577 (2000).

²⁸⁷ *But see id.* (arguing that it is not).

²⁸⁸ *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (alteration in original) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

²⁸⁹ *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)).

²⁹⁰ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) (quoting *Int’l Bus. Machs.*, 517 U.S. at 856).

²⁹¹ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001).

²⁹² *Id.* at 3.

²⁹³ *Id.* at 7 (emphasis omitted).

Second, if stare decisis is merely a common law doctrine, what prevents Congress from abrogating it?²⁹⁴ A backdrop is only a backdrop because something insulates it from change; otherwise, it's just regular law. Through the Necessary and Proper Clause, Congress has extensive power to regulate the business of the courts—prescribing rules of evidence²⁹⁵ (including evidence of the law²⁹⁶), giving certain cases scheduling priority over others,²⁹⁷ and so on. On the other hand, the allocation of the “judicial Power” to the courts imposes some limits on Congress’s ability to prescribe the course of decision, particularly in constitutional cases.²⁹⁸ Is a power to interfere with stare decisis too great for Congress to assume by implication, without some express language to that effect?²⁹⁹ And does it make a difference in which direction Congress moves the needle—either weakening stare decisis and requiring the Court to revisit past decisions, or strengthening it and further insulating those decisions from review?³⁰⁰ As troublesome as these questions are, they seem like the right ones to ask—as opposed to placing the full weight of stare decisis on the thin reed of “judicial Power.”

2. Future Directions

If stare decisis weren't enough, backdrops may also be able to shed light on two other areas of great concern to the judiciary: individual rights guarantees and judicial review.

a. Individual Rights

Backdrops may have several roles to play in disputes over the Constitution's guarantees of individual rights. Many of these guarantees are themselves thought to be incorporations by reference, codifying particular rights existing and recognized at the Founding. The

²⁹⁴ For discussions of this issue, see Harrison, *supra* note 97; McGinnis & Rappaport, *supra* note 278; Paulsen, *supra* note 286.

²⁹⁵ See, e.g., Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (2006)) (establishing the Federal Rules of Evidence).

²⁹⁶ See, e.g., 1 U.S.C. §§ 112, 204 (2006) (regulating the evidentiary effect of the Statutes at Large and U.S. Code); Fed. R. Civ. P. 44.1 (identifying sources of foreign law).

²⁹⁷ See, e.g., 18 U.S.C. § 3164 (2006) (trials of high-risk defendants); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(4), 116 Stat. 81, 114 (codified at 2 U.S.C. § 437h note (2006)) (constitutional challenges to campaign-finance law).

²⁹⁸ The classic cases on the topic are *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

²⁹⁹ See *infra* text accompanying note 365 (discussing the doctrine of great substantive and independent powers).

³⁰⁰ See Paulsen, *supra* note 286, at 1594 (raising this issue).

Seventh Amendment is an obvious candidate, as discussed above,³⁰¹ but not the only one. In *United States v. Stevens*, the Court construed “‘the freedom of speech’ codified in the First Amendment” to have excluded certain “historically unprotected” categories of speech.³⁰² Similarly, in *District of Columbia v. Heller*, the Court accepted historical “limitation[s] on the right to keep and carry arms” codified in the Second Amendment, potentially including bans on concealed or unusual weapons.³⁰³ More generally, the Court has described the Bill of Rights as “embody[ing] certain guaranties and immunities which we had inherited from our English ancestors,” which had “from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.”³⁰⁴ Because these exceptions were not “disregard[ed]” when the rights were codified, they “continued to be recognized as if they had been formally expressed.”³⁰⁵ This approach may not only be more faithful to the text, but may help prevent the creation of broader, ad hoc exceptions to exclude conduct that’s historically unprotected anyway.³⁰⁶

Additionally, backdrops may help inform the shape of individual rights guarantees to the extent that those rights are defeasible. One of the most contentious topics in modern constitutional law concerns the places in which constitutional rights apply and the persons entitled to their protection.³⁰⁷ The vocabulary of defeasibility, as applied to the law of nations and the law of war, may help articulate arguments for or against unstated geographic limits based on U.S. borders, personal limits based on citizenship or allegiance, or temporal limits based on a state of war or peace.³⁰⁸

b. Judicial Review

Backdrops may also have something to say about the nature of judicial review itself. The Constitution imposes many rules, but

³⁰¹ See *supra* text accompanying notes 44, 50–51.

³⁰² 130 S. Ct. 1577, 1585 (2010).

³⁰³ 554 U.S. 570, 626–27 (2008).

³⁰⁴ *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

³⁰⁵ *Id.*

³⁰⁶ See generally *Stevens*, 130 S. Ct. at 1585 (rejecting such exceptions).

³⁰⁷ See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (habeas corpus); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment).

³⁰⁸ See, e.g., Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009) (discussing doctrines of personal allegiance and protection); Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010) (discussing rights in time of war); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) (discussing potential geographic limits).

doesn't say—at least not in unmistakable terms—that judges must ignore an Act of Congress that violates those rules. The Supremacy Clause and federal question jurisdiction presume that the Constitution is law to be applied by courts,³⁰⁹ but they don't say whether judges may reach their own conclusions once Congress has spoken.

Some have portrayed the silent text as showing the absence of any broad commitment to judicial review at the Founding.³¹⁰ Others have argued that there was just such a commitment, and that judicial review was “initially taken for granted and presumed to exist.”³¹¹ Judges were expected to apply the law of the land, in which constitutions outranked statutes³¹²—with a presumption, perhaps, that Congress was unlikely to get it wrong.³¹³

Assuming that history supports the latter view,³¹⁴ why should it still be binding on us today? One possibility is that the rules recognized at the Founding went unaltered by the Constitution and today are insulated from future change. Because Congress lacks “[t]he judicial Power,”³¹⁵ it can't tell the courts how to decide their cases.³¹⁶ For the same reason, it can't require courts to defer to its judgment when any traditional presumption runs out. This understanding may not have been recorded in the text, but the text may make it binding nonetheless.

D. Backdrops and the States

1. State Sovereign Immunity

The states' immunity from suit in federal court is another area where the legal controversy has long outstripped the text. Article III granted judicial power over controversies “between a State and Citizens of another State,” and “between a State . . . and foreign . . .

³⁰⁹ U.S. CONST. art. VI, cl. 2; *id.* art. III, § 2, cl. 1; see Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 981 (2003).

³¹⁰ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 78 (2004) (“[J]udicial review of federal legislation would have been separately discussed and expressly incorporated into the text had the delegates contemplated using it to enforce the Constitution . . .”).

³¹¹ Bilder, *supra* note 49, at 508.

³¹² See HAMBURGER, *supra* note 49, at 17–18.

³¹³ Cf. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.) (reserving disagreement for a “clear and urgent case”).

³¹⁴ See generally, e.g., HAMBURGER, *supra* note 49; Bilder, *supra* note 49; Prakash & Yoo, *supra* note 309.

³¹⁵ U.S. CONST. art. III, § 1.

³¹⁶ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

Citizens or Subjects.”³¹⁷ These heads of jurisdiction were limited by the Eleventh Amendment, which provided that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”³¹⁸ Some argue that this restriction, by its terms, didn’t extend to other suits—such as those by a state’s own citizens “arising under th[e] Constitution, [or] the Laws of the United States.”³¹⁹ The Supreme Court has rejected that argument, holding states immune from all private suits,³²⁰ except where Congress has validly abrogated the immunity.³²¹ But its position isn’t obviously supported by the Constitution’s text.

Sovereign immunity is a complex topic, and this Article doesn’t presume to offer a definitive view. What it does argue, however, is that a certain family of arguments in favor of state sovereign immunity are usefully understood in terms of backdrops.

a. The Argument

Many defenders of state sovereign immunity note that prior to the Constitution, “courts could not command unconsenting states to appear at the behest of an individual.”³²² This followed from a common law rule, sometimes described as a rule of personal jurisdiction,³²³ that sovereign states were “immune from suit by individuals unless they consent.”³²⁴ Moreover, “the Founders generally seem to have assumed that the states would retain their preexisting immunity unless they expressly surrendered it in the Constitution.”³²⁵ But they debated, in the ratification conventions and in *Chisholm v. Georgia*,³²⁶

³¹⁷ U.S. CONST. art. III, § 2, cl. 1.

³¹⁸ *Id.* amend. XI.

³¹⁹ *Id.* art. III, § 2, cl. 1; *see, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

³²⁰ *See, e.g.*, *Hans v. Louisiana*, 134 U.S. 1 (1890).

³²¹ *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

³²² Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002).

³²³ *See id.*

³²⁴ Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1602 (2009).

³²⁵ Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1870 (2010).

³²⁶ 2 U.S. (2 Dall.) 419 (1793).

whether the state diversity provisions of Article III “should be construed as an express surrender” of that immunity.³²⁷

Several prominent Founders said no. Hamilton, in *The Federalist*, said it was “inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*.”³²⁸ This was “the general sense and the general practice of mankind,” and an “attribute[] of sovereignty . . . now enjoyed by the government of every state in the union,” which would “remain with the states” unless there were “a surrender of this immunity in the plan of the convention.”³²⁹ The Constitution in fact contained no express surrender of this kind, and to ascribe it “by mere implication . . . would be altogether forced and unwarrantable.”³³⁰ So, the preexisting rule continued in force.

Madison, in the Virginia convention, went into greater detail. On his account, under then-existing law, “[i]t is not in the power of individuals to call any state into court.”³³¹ Though the Constitution created judicial power for suits between states and some citizens, just as it did for other categories of cases (for example, permitting “citizens of different states [to] be carried to the federal courts”), none of these grants altered the separate and independent rules regulating the parties’ capacity to sue or be sued.³³² As he explained, the grant of judicial power

will not go beyond the cases where they may be parties. A *femme covert* may be a citizen of another state, but cannot be a party in this court. A subject of a foreign power, having a dispute with a citizen of this state, may carry it to the federal court; but an alien enemy cannot bring suit at all.³³³

Madison used ordinary diversity cases to illustrate that Article III said *nothing* about the parties’ capacity for suit. If an individual can’t sue because of ordinary rules of coverture or alienage, it doesn’t matter that the Constitution, in general, lets federal courts hear diversity cases. That general rule doesn’t remove the plaintiff’s specific disability; it addresses a different topic, just as a broad criminal prohibition addresses a different topic than a statute of limitations or a duress

³²⁷ Clark, *supra* note 325, at 1870.

³²⁸ THE FEDERALIST NO. 81, *supra* note 41, at 548 (Alexander Hamilton).

³²⁹ *Id.* at 549.

³³⁰ *Id.*

³³¹ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (photo. reprint 1941) (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d. ed. 1836) [hereinafter ELLIOT’S DEBATES].

³³² *Id.*

³³³ *Id.*

defense. For the same reason, the defeasible grant of power to the federal courts to hear certain cases between states and individuals didn't remove an individual's incapacity to sue a sovereign state without its consent—or, to put it another way, didn't render the states amenable to private suit. The common law's rules on these topics had simply been left alone, and of their own force they prevented suits against states. The state-individual provisions, in light of this background law, could “have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.”³³⁴

The Supreme Court disagreed. In *Chisholm*, the majority concluded that the power had indeed been surrendered,³³⁵ if it had ever existed.³³⁶ Justice Iredell, by contrast, suggested in dissent that the states' immunity had not been displaced, and so continued in force: “I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power.”³³⁷

On the argument considered here, the Eleventh Amendment was adopted to reverse *Chisholm*. The Amendment doesn't explicitly address federal question suits, but that's because (the argument goes) it didn't need to: “no clause in the Constitution addresses suits by an individual against his own state,” so there was no reason to think that the states surrendered their immunity in such cases.³³⁸ The Amendment allegedly overruled *Chisholm*'s reasoning, as well as its result, by “declar[ing] the proper method of construing the original Constitution,”³³⁹ “forbid[ding] any *construction* that *extends* federal judicial

³³⁴ *Id.*; see also, e.g., *id.* at 555 (statement of John Marshall) (“It is not rational to suppose that the sovereign power should be dragged before a court. . . . I contend this construction is warranted by the words.”); Charles Jarvis, Speech in the Massachusetts House of Representatives (Sept. 23, 1793), in 5 DHSC, *supra* note 86, at 436, 436 (“But *must* we infer, under so general a description as the one we have . . . , that every particular case is necessarily included in the powers devolved on [the federal courts]? Are there no exceptions? The words may mean a great deal—but do they mean everything?”); *id.* at 437 (“Is it not then most natural to infer, that the Constitution was not intended to *create* occasions upon which its power was to be exerted, but to operate simply upon those which had an actual existence.”).

³³⁵ See, e.g., 2 U.S. (2 Dall.) 419, 451 (1793) (opinion of Blair, J.); *id.* at 467 (opinion of Cushing, J.); *id.* at 476–77 (opinion of Jay, C.J.).

³³⁶ See, e.g., *id.* at 455–56 (opinion of Wilson, J.) (arguing that it had not); *id.* at 472–73 (opinion of Jay, C.J.) (same).

³³⁷ *Id.* at 421 (opinion of Iredell, J.).

³³⁸ Menashi, *supra* note 150, at 1186.

³³⁹ Lash, *supra* note 324, at 1582.

power to suits brought by out-of-state individuals against a state,”³⁴⁰ and thereby “restor[ing] the interpretation of Article III that Federalists had promised the ratifiers in the state conventions.”³⁴¹ With the prior reading restored, the common law rules protecting states from private suits remained in force for every head of jurisdiction. Thus, the Eleventh Amendment “did what everyone expected it to do”: it “reaffirm[ed] the absence of judicial power to hear suits by individuals against states[,] when understood in light of widely shared beliefs.”³⁴² And that’s why, soon after adoption, the Attorney General described the Amendment as “explanatory,” reflecting “the policy of the people to cut off that branch of the judicial power, which had been supposed to authorize suits by individuals against states.”³⁴³

On this argument, the alleged absence of federal question suits from the Amendment’s text doesn’t matter. *Chisholm* was wrong because Article III really left the states’ preexisting immunity in force. That immunity bars federal question suits, and it surely wasn’t abrogated by the addition of the Eleventh Amendment. Maybe some supporters wanted the Amendment to mention federal question suits and couldn’t get enough votes, but that wouldn’t allow those *resisting* such language to transmute *their* unenacted hopes and dreams into law.³⁴⁴ “If Congress did not actually resolve those broader questions, assuming that the Amendment did resolve them dishonors a congressional choice to address only one limited question at a time (or at all).”³⁴⁵ And if the Amendment didn’t resolve them, then prior law continues to apply.

b. The Implications

That, at least, is the argument, as it might be understood through the lens of backdrops.³⁴⁶ This Article ventures no conclusions as to whether it is correct. But if so, what are the implications of looking at state sovereign immunity this way?

First, doing so would avoid any claim that constitutional provisions mean more than they say. The Court’s Eleventh Amendment jurisprudence has often been criticized as treating the Amendment’s

³⁴⁰ *Id.* at 1687.

³⁴¹ *Id.* at 1586.

³⁴² Clark, *supra* note 325, at 1837.

³⁴³ *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (argument of counsel); *accord* Clark, *supra* note 325, at 1894.

³⁴⁴ *See* Menashi, *supra* note 150, at 1187–88.

³⁴⁵ *Id.* at 1187.

³⁴⁶ Of course, the authors cited might not accept this depiction as accurate.

text as a font of hidden meaning,³⁴⁷ and the same criticism has been lodged against other textualist defenses. For example, Michael Rappaport has argued that the Constitution's term "State" must be understood to mean "an entity with some . . . of the sovereign powers of an independent country,"³⁴⁸ including the right to sovereign immunity,³⁴⁹ and that "judicial Power" must be understood to mean "the power to adjudicate as traditionally exercised by Anglo-American courts,"³⁵⁰ including the limitations of sovereign immunity.³⁵¹ Though states may in fact have had such immunity, and courts may in fact have respected it, it's far from clear that those facts were *linguistic* ones about the meaning of "State" or "judicial Power," rather than features of the objects to which those terms referred.³⁵² A defeasible reading of Article III would take the heads of jurisdiction to mean, if anything, somewhat *less* than they say—something far from unusual for legal rules.

Second, this argument could explain federal and state sovereign immunity in similar terms. Nearly everyone agrees that the Constitution permits *federal* sovereign immunity, notwithstanding the "impossibility of locating that principle in any particular textual provision."³⁵³ Federal sovereign immunity may follow from a similar common law presumption, one that wasn't abrogated by the grant of judicial power over "Controversies to which the United States shall be a party."³⁵⁴ Treating both immunities as defeaters to Article III would help resolve this confusion.

Third, this understanding helps to decouple state sovereign immunity from the Eleventh Amendment's text. The Amendment, on this picture, served only to confirm that *Chisholm's* reasoning was wrong, thereby reestablishing the proper relationship between Article III and other rules about personal jurisdiction or capacity for suit. More detailed questions about the scope and strength of state sover-

³⁴⁷ See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

³⁴⁸ Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 831 (1990).

³⁴⁹ *Id.* at 873–74.

³⁵⁰ *Id.* at 870.

³⁵¹ *Id.*

³⁵² See Young, *supra* note 4, at 1624–26 and accompanying notes. The same could be argued with regard to "Cases" and "Controversies." Cf. Nelson, *supra* note 322, at 1565 (suggesting that sovereign immunity might be encapsulated in these terms).

³⁵³ Young, *supra* note 4, at 1633; accord Menashi, *supra* note 150, at 1156.

³⁵⁴ U.S. CONST. art. III, § 2, cl. 1.

eign immunity—whether it applies to suits by foreign sovereigns,³⁵⁵ whether it applies in administrative proceedings,³⁵⁶ whether it may be claimed by various public entities as arms of the state,³⁵⁷ whether it can be evaded by suing state officers in their official capacity for injunctive relief³⁵⁸—depend on the history of the common law immunity, not on the text and history of the Amendment itself (and not on general philosophies of federalism or sovereign dignity).

Fourth, viewing state sovereign immunity as a continued common law rule is significant for the question of congressional abrogation. Remember, to be a true backdrop, it's not enough that a rule was left unaltered; it also has to be immune from the usual means of legal change. According to the picture above, the Eleventh Amendment doesn't impose its own rule against private suits in federal question cases. It just reinforces a construction of Article III that says *nothing* about states' amenability to individual suits, and so leaves preexisting immunities untouched.

But if state sovereign immunity is merely a common law rule, then it, like other common law doctrines, can be abrogated by statute—as Justice Souter argued in his famous dissent in *Seminole Tribe of Florida v. Florida*.³⁵⁹ Congress, through the Rules Enabling Act,³⁶⁰ has already expanded personal jurisdiction and capacity-for-suit rules: a party may be sued on a federal claim even if no state would have personal jurisdiction,³⁶¹ and unincorporated associations lacking capacity under forum-state law may sue and be sued to enforce a federal right.³⁶² If Congress can override other state rules of this kind, can it do the same thing with respect to the states themselves? Or was the power to abrogate state immunity also not “surrender[ed] . . . in the plan of the convention”³⁶³?

This is a standard enumerated-powers question, one that must be dealt with through ordinary interpretation. For instance, abrogating sovereign immunity might be necessary and proper to implementing other federal powers, particularly in federal question suits. Alternatively, abrogating states' immunity might be—in the language of

355 See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

356 See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

357 See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994).

358 See *Ex parte Young*, 209 U.S. 123 (1908).

359 See 517 U.S. 44, 159 (1996) (Souter, J., dissenting).

360 28 U.S.C. § 2072 (2006).

361 FED. R. CIV. P. 4(k)(2).

362 FED. R. CIV. P. 17(b)(3)(A).

363 THE FEDERALIST NO. 81, *supra* note 41, at 549 (Alexander Hamilton).

*M'Culloch v. Maryland*³⁶⁴—the kind of “great substantive and independent power, which cannot be implied as incidental to other powers,” and which would have been granted explicitly if granted at all.³⁶⁵ Commanding states, as states, to respond to compulsory federal process may not be very different from commanding them to enforce federal laws³⁶⁶ or to enact legislation chosen by Congress;³⁶⁷ all three might be outside the range of means that “consist with the letter and spirit of the constitution.”³⁶⁸ (And perhaps the answer is different depending on which power is exercised—for example, Section 5 of the Fourteenth Amendment as opposed to Article I, Section 8.³⁶⁹) But if the states’ immunity wasn’t altered by the Constitution, and if it is today immune from abrogation, then it may qualify as a constitutional backdrop.

2. Future Directions

Backdrops may also offer a new way of thinking about the bounds of state authority, with regard to both choice of law and judicial jurisdiction. For much of our history, these doctrines were frequently conceptualized as issues of general law, in particular private international law.³⁷⁰ But the Court has also insisted that limits on state authority be “implied from the words of the Constitution,”³⁷¹ not just from general law. In the field of judicial jurisdiction, for example, rules of general, international, or common law have been steadily replaced by constitutionalized rules under the Fourteenth Amendment’s Due Process Clause.³⁷² The result has been increased confusion; doctrines of due process rarely produce clear results when applied to new fields.³⁷³

³⁶⁴ 17 U.S. (4 Wheat.) 316 (1819).

³⁶⁵ *Id.* at 411; see Nelson, *supra* note 322, at 1640; cf. Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 60–68 (2010) (discussing the doctrine of incidental powers).

³⁶⁶ See *Printz v. United States*, 521 U.S. 898 (1997).

³⁶⁷ See *New York v. United States*, 505 U.S. 144 (1992).

³⁶⁸ *M'Culloch*, 17 U.S. at 421; see Nelson, *supra* note 322 (describing this claim).

³⁶⁹ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996).

³⁷⁰ See Nelson, *supra* note 63, at 539–40 (describing conflicts rules that originated in general law); see also *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (analyzing the conflict of laws as a topic in international law).

³⁷¹ *Missouri v. Illinois*, 200 U.S. 496, 519 (1906).

³⁷² U.S. CONST. amend. XIV, § 1. See generally James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004) (describing this evolution).

³⁷³ Cf. *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 32–34 (2008) (Thomas, J., concurring) (criticizing the state of the doctrine).

A backdrops approach could illuminate atextual constraints on state powers, including constraints arising from general law or the law of nations. For example, if the general law at one time restricted states' exercise of jurisdiction beyond their borders,³⁷⁴ are those limits still binding today? Can a state repeal those limits, either as to the jurisdiction of its courts or the reach of its legislation? And if it does, must that repeal be recognized as valid in federal courts or in the courts of other states?³⁷⁵ These questions may be difficult, but they may shed more light on the issue than does an ever-narrower focus on the Due Process Clause.

III. HOW ARE BACKDROPS DEFENSIBLE?

The previous Part identified a long list of issues on which backdrops may prove useful. The length of the list may just show that once you have a hammer, everything starts looking like a nail. But it also shows the wide variety of areas that may rely on atextual rules.

This final Part defends the theory of backdrops against six objections: (1) that backdrops are no different from ordinary interpretation; (2) that they aren't binding; (3) that they represent the dreaded dead hand of the past; (4) that they're too changeable; (5) that they're inconsistent with modern views of the common law; and (6) that they open the door to wild claims of unenumerated powers or unenumerated rights. In the end, none of these objections has purchase.

A. *The "Old News" Objection*

Backdrops are really no different from ordinary, history-minded interpretation. Interpretation often requires sensitivity to preexisting historical rules. And getting the text right, in the ordinary sense, can depend on an awareness that rules like backdrops exist. (If we'd never heard of criminal defenses, we might read new criminal statutes differently; and if we didn't know the history behind sovereign immunity, we might take a different view of Article III.) Once we do know these things, we're more attuned to the interpretive question of whether the text supplies the relevant rules, or whether it leaves those issues where it found them.

³⁷⁴ See *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 386–87 (1818) (“What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.”).

³⁷⁵ See 28 U.S.C. § 1652 (2006) (requiring the use of state laws as rules of decision “in cases where they apply”); see also Laycock, *supra* note 96, at 278–83 (arguing that a basic goal of diversity jurisdiction was to provide access to federal choice-of-law rules).

Interpreting the text does often require awareness of history—including historical rules that the law might have left in place. But backdrops can't be reduced to interpretations of text. The meaning of the word "states" doesn't incorporate rules of accretion and avulsion, and the Debts and Engagements Clause makes certain debts binding based on facts about old debts, not about language.

Even as to defeasibility, we don't need to know the full content of a backdrop to read the text; we just need to know that it's a distinct topic in the law. For example, to say that criminal statutes generally don't speak to defenses, we need to know that there *are* common law defenses, but not which precise defenses there are. The nature and elements of those defenses will be determined by unwritten rules, not statutory text. The backdrops inquiry is distinct from ordinary history-minded interpretation in that we end up looking to the external sources, and not the meaning of language, for the legal answers we need.

The line between general topics and precise contours can be blurry, and there will be cases when we need to know more or less to read the text correctly (for instance, if a statute seems to abrogate one defense while preserving others). But the text and the independent legal rules are still doing different work, and require different kinds of evidence. Evidence of adherence to a past legal rule isn't the same as evidence of usage or linguistic meaning, and conflating them will only lead to confusion.

Moreover, backdrops generally don't derive their present legal force from any provision of the Constitution—even if they depend on the text for their continued protection from change. The rules governing civil jury trial, state borders, or legislative entrenchment make claims to legal authority based on other foundations. That alone should make them interesting enough to be deserving of separate study.

B. The "Minimalist" Objection

If backdrops aren't part of the text, why are they binding?
I'm willing to follow the Constitution, but I never signed up
for these mysterious unwritten rules. If the text doesn't say
it, why should anyone listen?

This objection misunderstands our common law system. The Constitution wasn't supposed to express the entire corpus juris; that would have required its authors to exhaustively recount everything in the law, for fear of silently repealing anything they forgot. Nor do

legislatures have to put all of the law into statutes; they can rely on the common law to cover the rest, leaving well enough alone.

Ignoring unwritten sources of law isn't minimalist, but maximalist: it deprives enactors of the choice of how and when to depart from existing law, and substitutes judges' views in their place. The Constitution might not say whether a particular strip of land is in Maryland or Virginia, but that doesn't mean we can just make it up as we go along. Instead, the question might be subject to other kinds of rules (including *very* old rules, like the charter to Lord Baltimore in 1632),³⁷⁶ which everyone expects to apply until they're properly changed. That's an ordinary feature of our legal system, and hardly unique to backdrops.

C. *The "Dead Hand" Objection*

You want us to follow old common law doctrines that were never ratified by the states or even enacted by any legislature. This is the dead hand with a vengeance. Americans will be bound by centuries-old law that no one ever voted for and that only a constitutional amendment can repeal. And as time goes on, the old rules will be less and less well-suited to our modern democratic society.

As the backdrops approach recognizes, some law that the Constitution makes binding on us isn't contained in the Constitution's text. But the reason why we can't change that law is far from arbitrary: it's due to features of the text itself. The dead hand's grasp is no stronger here than for any theory that adheres to an old Constitution.

Think of the three types of backdrops identified above. If the Constitution incorporated an external rule by reference, as in the Debts and Engagements Clause, the fact that the rule wasn't restated fully in the text doesn't affect its democratic legitimacy.³⁷⁷ Everyone knew that debts and engagements were being preserved; it just made sense to save ink and parchment (and avoid errors) by not naming them individually.

Alternatively, if the Constitution left a particular rule alone—like the law of state borders—while barring present legal actors from changing it,³⁷⁸ the dead hand problem comes from this bar on change, not the initial choice to leave the rule undisturbed. But the bar on change *is* part of the text: the authors thought it would be a good idea

³⁷⁶ See *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1041 (D.C. Cir. 2011).

³⁷⁷ See *supra* text accompanying notes 40–41.

³⁷⁸ See *supra* text accompanying notes 58–65.

to prevent states or Congress from unilaterally messing with the borders. They may have been wrong about that, but keeping the rules as they were was a perfectly rational response, and in any case was the explicitly chosen strategy. In the end, the objection boils down to the usual dead hand problem, just focused on particular provisions of the text.

Finally, if the Constitution includes defeasible language that lets a preexisting rule alter the scope of an otherwise broad text, the dead hand objection should be directed to those who chose the defeasible language. If, for example, the sovereign-immunity arguments above are right,³⁷⁹ it's hard to claim that anyone was snookered by the defeasibility. Madison, Hamilton, and Marshall were the ones *promising* everyone that the Constitution wouldn't alter or abrogate the states' immunity from suit; if anyone felt snookered, it was the Anti-Federalists after *Chisholm*. The Constitution's authors chose language that left certain rules undisturbed, which is a typical legislative choice. (The live-geese statute doesn't mention duress,³⁸⁰ but eliminating the defense would hardly serve democracy.) And the real issue, anyway, is whether the immunity can be abrogated; if Congress wasn't given enumerated power to do so, then *that* decision—not defeasibility—is the real source of the dead hand.

In general, the suggestion that the hand is any deader here fails to recognize the importance of a legislative *failure* to act. The authors of the Constitution had a limited amount of time and energy; they allocated it to certain issues and left others alone. Overturning their choice to leave well enough alone is just as much of an interference with the law they produced as discarding pieces of the express text.

D. The “Changing Law” Objection

You keep talking about backdrops coming from “preexisting” law, in particular law that predated the Constitution. But the common law isn't static; it evolves. When a rule is incorporated as a backdrop, does it lose its common law character and become fixed for all time? Or do the backdrops keep changing with the times, depriving us of certainty?

Backdrops are subconstitutional rules that the Constitution prevents the usual actors from changing. Whether a backdrop can change “on its own,” though, depends on what kind of law it is. Some incor-

³⁷⁹ See *supra* text accompanying notes 322–45.

³⁸⁰ See *supra* text accompanying notes 129–33.

porations by reference change all the time; think of the Ex Post Facto Clauses, which add to the set of protected state laws every day. As Justice Scalia has argued, there's nothing surprising about the idea "that our unchanging Constitution refers to other bodies of law that might themselves change."³⁸¹ The Fifth and Fourteenth Amendments protect "property,"³⁸² but "the existence of a property interest" isn't timeless; it's "determined by reference to [currently] existing rules or understandings that stem from an independent source such as state law."³⁸³

Most of the backdrops described above are common law rules. How, exactly, the common law can change over time is a fascinating question—and one that's generated much disagreement.³⁸⁴ The Supreme Court took three different views of this question in *Dixon v. United States*.³⁸⁵ The issue in *Dixon*, as discussed above, was which side bore the burden of persuasion on a duress defense to a crime created by the Safe Streets Act in 1968.³⁸⁶ The traditional common law rule was that the defendant bore the burden, and the Court (per Justice Stevens) tried to determine how the 1968 Congress "would have wanted us to effectuate the duress defense in this context."³⁸⁷ Because no pre-1968 case had yet upset the traditional rule, the Court "presume[d] that Congress intended" the burden to remain with the defendant.³⁸⁸

Five Justices disagreed with this approach—though three of them joined the opinion anyway. Justice Alito (joined by Justice Scalia) denied that "Congress makes a new, implicit judgment about the allocation of these burdens whenever it creates a new federal crime."³⁸⁹ Instead, he argued, because "[d]uress was an established defense" at common law, "the burdens remain where they were when Congress began enacting federal criminal statutes."³⁹⁰

³⁸¹ *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting).

³⁸² U.S. CONST. amend. V; *id.* amend. XIV, § 1.

³⁸³ *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

³⁸⁴ See, e.g., Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (arguing for a more flexible understanding of constitutional provisions incorporating the common law).

³⁸⁵ 548 U.S. 1 (2006).

³⁸⁶ See *supra* notes 159–60 and accompanying text.

³⁸⁷ *Dixon*, 548 U.S. at 16.

³⁸⁸ *Id.* at 17.

³⁸⁹ *Id.* at 19–20 (Alito, J., concurring).

³⁹⁰ *Id.* at 19.

Justice Kennedy, writing separately, agreed that courts should generally interpret statutes in light of “background understandings” of “the Anglo-American legal tradition.”³⁹¹ But he suggested that those principles could themselves evolve, with future courts taking account of “innovative arguments” and “the insight gained over time as the legal process continues.”³⁹² So did Justice Breyer, joined in dissent by Justice Souter, who argued that courts must modify common law rules by “taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience.”³⁹³ The only difference was that Justices Breyer and Souter thought the common law had evolved enough to shift the burden to the government, while Justice Kennedy did not.

Given these positions, the only thing that can be said for certain is that the Court majority’s approach seems wrong. By enacting a criminal law in 1968, Congress didn’t invisibly bake the common law as it then stood into the words of the statute. This is wrong as a picture of how language works—or how Congress works—and it’s particularly wrong as a picture of what the Framers did at Philadelphia. The text doesn’t just vacuum up all the prevailing expectations and understandings and turn them into constitutional law; that conflates original expected applications with original meaning. Here, the statute *said* nothing about duress. So, to the extent such a defense applied, it could only be because a rule of common law still provided for it at the time of the criminal act. How the law stood in 1968, in particular, is irrelevant.

This still leaves the question of whether and how that rule of common law can change—and whether it can *be* changed, deliberately, by judges. Justice Alito’s view (that it can’t) has the advantage of not presenting Congress with a moving target, which might over time evolve in such a way as to break a carefully designed statutory scheme. But the fact that texts may be drafted with other rules in mind is a reason to treat an evolving common law as problematic—not a reason to assume that the common law can’t evolve, or to treat the common law at the time of enactment as somehow smuggled into the text itself.

Think back to the hypothetical Limitations Commission, which issues regulations setting a limitations period for crimes.³⁹⁴ Maybe in

³⁹¹ *Id.* at 17 (Kennedy, J., concurring).

³⁹² *Id.*

³⁹³ *Id.* at 22 (Breyer, J., dissenting).

³⁹⁴ *See supra* text accompanying notes 153–54.

1968 Congress passed a statute with a particular prison sentence, chosen in light of the then-prevailing four-year limitations period. If the Commission changes the limit to three years, it might frustrate Congress's expectations, but it's not forbidden by hidden meanings of the statute. Nor can judges adjust the statutory penalty to what they now think Congress might have wanted in case of a three-year limit. The fact that future regulations might "break" the statutory scheme is a consequence of the Commission's legal authority to regulate, which the 1968 Congress could have taken away if they didn't want it to exist.

The same argument can be made in the context of backdrops. If, at the Founding, the common law was understood to evolve (or if the law authorized judges to alter it deliberately), then the authors of the Constitution made their decisions in that context and there's no one else to blame if the law evolves in ways that frustrate their choices. (If they wanted to change it, they should have said something.) By contrast, if the common law *wasn't* understood to evolve back then, or if judges lacked legal authority to alter it, then there'd be no basis for saying the opposite today—unless some legally relevant change occurred in the meantime. In the end, the question comes down to the nature of common law rules, not to anyone's unenacted hopes and dreams.

E. The Erie Objection

Except for a few positive instruments like old debts and engagements, almost all of the rules you're talking about are some kind of general common law. But *Erie* said that there "is no federal general common law,"³⁹⁵ or any "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."³⁹⁶ That matches your general law to a T.

Plus, even if general common law could exist in different states, the Court held in *Wheaton v. Peters* that "there can be no common law of the United States," only of particular states.³⁹⁷ So unless backdrops change at every state line, there's nothing for a court to apply anyway.

³⁹⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

³⁹⁶ *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

³⁹⁷ 33 U.S. (8 Pet.) 591, 658 (1834).

Finally, even if such a thing existed at one time, it no longer does today. Any *Swift v. Tyson*³⁹⁸-like consensus on general law has long since broken down, and a court that tries to search for and apply this general law will simply have nothing to apply. Besides, the idea that courts “discover” the law without making it is a myth, so any attempt to apply old rules faithfully is doomed to failure.

This objection is more serious than the previous ones, but still surmountable. *Erie* certainly was hostile to the idea of general law. But Americans also lived without *Erie* for 150 years after the Founding, during which courts routinely and uncontroversially cited general law or international law principles.³⁹⁹ Being sensitive to history makes it hard to ignore that fact—and doing so might break other legal rules or institutions that were designed with general law in mind.

Moreover, the kind of law that those courts applied—and that the theory of backdrops would apply today—wasn’t “*federal* general common law,” which could trump state law in an area of state authority.⁴⁰⁰ If states have authority to alter a rule, then it can’t be a backdrop; it’s just ordinary law. Rather, a general law backdrop would only be binding on the states (for instance, in interstate border disputes) because something *else*, something actually in the Constitution, bars their interference with it. As a result, *Erie*’s concern that federal courts were running roughshod over the rights of states has no application here. So long as the courts stick to the law the Constitution left in place, they’re not stepping on anyone’s toes.

The status of the common law in the United States as a whole is a fascinating topic, on which I hope to do further work. But it’s worth noting that the decision in *Wheaton* didn’t actually get rid of the “common law of the United States.”⁴⁰¹ Admiralty law, for example, is largely unwritten law applied by national courts. And all of the “enclaves” of federal common law that exist today—like the water apportionment opinion released on the same day as *Erie*⁴⁰²—represent the national application of common law doctrines.

The strongest portion of this objection is the claim that applying preexisting rules is impossible, as the consensus that created those rules is gone. On many issues, that won’t be true; the Supreme Court

³⁹⁸ 41 U.S. (16 Pet.) 1 (1842).

³⁹⁹ See Fletcher, *supra* note 82; Nelson, *supra* note 82; Nelson, *supra* note 63.

⁴⁰⁰ See Nelson, *supra* note 82 (manuscript at 5) (distinguishing “federal” from “general” law).

⁴⁰¹ See generally Nelson, *supra* note 63 (describing the continuing influence of general law).

⁴⁰² *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

has done remarkably well at applying the law of sovereign borders over time. But even if that were true, the answer would just be that the law is unclear. The legal system already has ways of dealing with these problems: if a party relying on the law can't demonstrate a legal entitlement to recover, they lose.⁴⁰³

Finally, the claim that even if there were a consensus, judges couldn't be trusted to follow it, carries cynicism to the point of absurdity. Judges are obliged all the time to discover law without making it: that's the essence of an "*Erie* guess," in which a federal court must "divin[e] the content of forum state law" based on external sources, rather than "choos[ing] the rule of law that it believes is 'better' in some sense or the rule of law that it would adopt for itself."⁴⁰⁴ The fact that this process is not perfectly mechanical, and may involve some degree of judgment in application,⁴⁰⁵ hardly means that the law—even the general law—is whatever the courts say it is.⁴⁰⁶

F. The "Unenumerated" Objection

Accepting backdrops that go beyond the text would open Pandora's Box. Courts would face new claims of unenumerated powers, like those in *United States v. Curtiss-Wright Export Corp.*,⁴⁰⁷ and unenumerated rights, like those in *Calder v. Bull*.⁴⁰⁸ Creative lawyers would have a field day.

A backdrops theory certainly could open the door to unenumerated powers and rights. For example, if the President has a removal power, that power is unenumerated, just like the alleged foreign affairs powers in *Curtiss-Wright*. But that's not a criticism of the theory. *If* the Union enjoyed a foreign affairs power before the Constitution or the Articles of Confederation, and *if* that power descended specifically to the executive branch, and *if* that power is outside the scope of textual provisions (such as the Tenth Amendment) that might limit it,⁴⁰⁹ and *if* that power is immune from ordinary means of change, *then* the reasoning in *Curtiss-Wright* might be correct. What matters is

⁴⁰³ See Easterbrook, *supra* note 150, at 534.

⁴⁰⁴ 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4507 (2d ed. 1996).

⁴⁰⁵ See HART, *supra* note 174, at 128–29.

⁴⁰⁶ See *id.* at 141–47.

⁴⁰⁷ 299 U.S. 304 (1936).

⁴⁰⁸ 3 U.S. (3 Dall.) 386 (1798).

⁴⁰⁹ Including by implication, through the adoption of precise rules that occupy the field. The Court has sometimes understood statutes imposing complex regulatory regimes to displace the common law in the relevant subject areas. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537–40 (2011) (greenhouse gas regulation); *Milwaukee v. Illinois*, 451 U.S. 304,

whether those things are true, or whether it's all baloney.⁴¹⁰ The backdrops approach gives precisely as much weight to unenumerated-power claims as they deserve.

Unenumerated rights get the same treatment: what matters is the strength of the historical case, not any preordained conclusion. Consider Justice Chase's argument in *Calder*:

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.⁴¹¹

This argument sounds in defeasibility. Chase says there are implicit conditions that operate to defeat various express delegations of power to state and federal governments. Just as the live-geese statute doesn't eliminate duress, or heads of judicial power don't override the rules on capacity for suit, delegating a general power (say, to regulate commerce) wouldn't confer any power to take from *A* and give to *B*.

There's nothing wrong with the form of that argument. What matters is whether it's *true*, and this may depend on history. What kinds of powers should we understand the Constitution to confer? What "prepolitical rights," if any, were thus "'retained' by the people"?⁴¹² Even at the time Chase wrote, there was significant disagreement on the Court about these natural-rights claims, and about

316–19 (1981) (water pollution control). The same might be true of a precise allocation of powers elsewhere in the Constitution.

⁴¹⁰ See generally, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659 (1997) (arguing the latter); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000) (same). But see Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509 (2007) (arguing for unenumerated Indian affairs powers).

⁴¹¹ 3 U.S. at 388–89 (opinion of Chase, J.) (emphasis omitted).

⁴¹² Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 175.

whether they could be judicially enforced. As Justice Iredell wrote, if a legislature

shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.⁴¹³

Even assuming, moreover, that the Constitution is defeasible with regard to some set of unenumerated rights, this still wouldn't open Pandora's Box all the way. The unenumerated rights thus protected would really be more like *nonenumerated powers*—powers that the new government ostensibly had on paper, but which it actually lacked. Defeasibility acts as a limitation on a text, not as a font of new authority. Thus, claims that (for example) the Constitution contains unenumerated rights to various types of social welfare programs would be harder to make through the vehicle of defeasibility.

The rights thus protected would also have to have been recognized at a particular time in history. (A category of defeater that didn't exist until the twentieth century couldn't have been reserved from a delegation made in the eighteenth.) In particular, any right thus reserved would have to have been recognized as *law*. The initial requirement for a backdrop is legal recognition, not "the mere existence of a social or political consensus contrary to the text."⁴¹⁴ (As Hart explained, the failure "to take off a hat to a lady is not a breach of any rule of law"; a custom becomes law "only if it is one of a class of customs which is 'recognized' as law by a particular legal system."⁴¹⁵) Thus, the states don't enjoy sovereign immunity today because a diffuse majority of the Founding generation wanted them to; they enjoy it, if at all, because their preexisting claim to immunity had a recognized legal status.

This fact differentiates the theory of backdrops from the "'big ideas' structuralism"⁴¹⁶ that Ernest Young identified in opinions like

⁴¹³ *Calder*, 3 U.S. at 399 (opinion of Iredell, J.).

⁴¹⁴ Manning, *supra* note 347, at 1720.

⁴¹⁵ HART, *supra* note 174, at 44–45.

⁴¹⁶ Young, *supra* note 4, at 1604.

Alden v. Maine,⁴¹⁷ in which the constitutional structure enforces “certain broad principles . . . drawn from the history of legal and political theory” but absent from the text.⁴¹⁸ Like the structuralism Young described, the theory of backdrops “recognizes that the Constitution rests on a foundation of ideas and practices which frequently are only reflected—not comprehensively captured—by the document itself.”⁴¹⁹ Given that “the Framers could not have considered every question in advance,” it tries to “identify the broader presuppositions that the Framers held”—presuppositions that “had frequently developed over many generations and through application to innumerable diverse circumstances,” and thus were “generally more robust than the limited set of possibilities addressed in the text itself.”⁴²⁰ But where the backdrops approach departs from “‘big ideas’ structuralism” is in insisting that these residual principles not remain at the amorphous level of political theory, but take the more determinate form of recognized rules of law.⁴²¹

As with any other legal concept, the use of constitutional backdrops “can be done well or poorly.”⁴²² Anyone arguing for the continued application of particular subconstitutional rules of law “must be careful to take those principles as he finds them—complete with their historical qualifications—rather than picking and choosing among different aspects of those principles so as essentially to *construct* what he had always hoped to find.”⁴²³ When asserting that a particular rule of law was preserved by the Constitution, “the interpreter must select the level of abstraction” for that rule “that is best reflected in the his-

⁴¹⁷ 527 U.S. 706 (1999).

⁴¹⁸ Young, *supra* note 4, at 1603.

⁴¹⁹ *Id.* at 1661.

⁴²⁰ *Id.*

⁴²¹ One could draw a similar distinction between backdrops and Michael Dorf’s theory of an “extraconstitutional Rule of Recognition.” See Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 28, at 69, 74. Dorf places substantial weight on customary norms of official behavior, such as the widespread aversion to court packing, jurisdiction stripping, and any other practice that “*just isn’t done*.” *Id.* at 81. But these norms—like those cited by Hart, *see supra* text accompanying note 415—may or may not be recognized as *law*. For instance, had Roosevelt’s court-packing plan passed Congress, no one would have said that the newly confirmed Justices weren’t really Justices, or weren’t entitled to draw their salaries, or should be prosecuted for impersonating federal officers when they sit on the bench. Yet if Roosevelt had ignored Congress entirely and had started issuing judicial commissions on his own, everyone would have agreed that *these* Justices lacked legal authority. Because this sense of legal invalidity is absent, it’s hard to say whether the “extraconstitutional Rule of Recognition” is a true rule of recognition.

⁴²² Young, *supra* note 4, at 1604.

⁴²³ *Id.* at 1605.

torical materials themselves.”⁴²⁴ In the end, however, the choice is not a normative one; “it turns on what the relevant historical evidence shows.”⁴²⁵

CONCLUSION

Constitutional backdrops are rules of law that function *like* constitutional rules, but are not contained in the Constitution. These include rules that were explicitly incorporated by reference, that were independently insulated from change, or that durably limit the scope of the text’s language.

This theory helps explain why the constitutional text seems so indeterminate on so many significant questions. The authors of a constitution don’t *need* explicit agreement on an area that can be handled acceptably by preexisting law. Ignoring that area altogether leaves prior law in place, to operate of its own force, and lets the authors focus on other things that actually need fixing.

As a result, it’s perfectly all right that the text doesn’t answer all our questions. When the text runs out, there’s no interpretive crisis to be solved by extraordinary measures—such as open-ended construction, gauzy structural inferences, or judicial creativity. We just continue the lawyer’s work of sorting through otherwise-applicable background law.

Backdrops may also have the potential to turn down the temperature of constitutional disagreement. People might disagree about the content of various pieces of background law—like what powers were regarded at the Founding as “incident” to the Executive—without disagreeing on THE MEANING OF THE CONSTITUTION. The activity of “constitutional interpretation” gets deflated, and we can get back to the “normal science” of assessing our sources.

Adding the category of backdrops to our legal system does make things more complicated. It would be nice if every important constitutional question could be answered by a document that fits in your pocket. But that is not how the law works—and in particular, that is not how *our* law works. If our Constitution, as best understood, left prior rules in place and protected them from change, then we are bound to apply those rules, once we figure out what they are.

⁴²⁴ *Id.* at 1649 n.239.

⁴²⁵ *Id.* at 1648.